TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted]62

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF CORNELL STEAMBOAT COMPANY, PLAINTIFF IN ERROR,

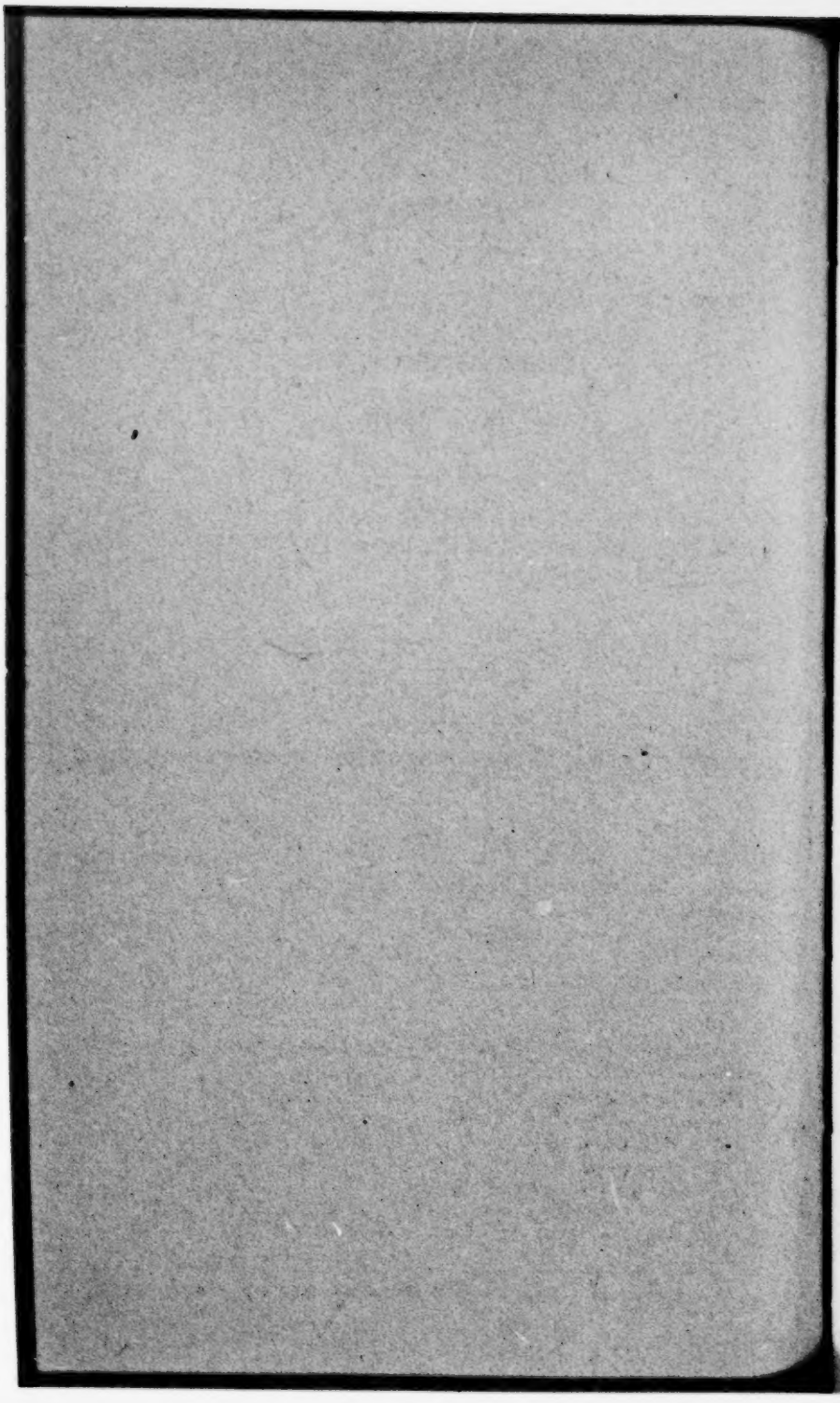
vs.

WILLIAM H. SOHMER, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED OCTOBER 21, 1913.

(23,396)



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a New York Court of Appeals.

THE PEOPLE ex rel. CORNELL STEAMBOAT COMPANY, Appellant,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Respondent.

Return on Appeal.

Amos Van Etten, Attorney for Appellant, Kingston, N. Y.
Thomas Carmody, Attorney General, Attorney for Respondent, Albany, N. Y.
Received & read Oct. 2, 1912.

EDGAR M. CULLEN,
Chief Judge, Ct of Appeals.

Filed Oct. 16, 1912. Clerk's Office, Albany County, N. Y.

1 Supreme Court, Appellate Division, Third Judicial Department.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. CORNELL STEAMBOAT COMPANY, Relator,
against
OTTO KELSEY, Comptroller of the State of New York, Defendant.

Statement Under Rule 41.

This proceeding was instituted by a writ of certiorari allowed and issued October 15th, 1904, to review a decision and order of the Comptroller of the State of New York, made September 19th, 1904, denying an application of the relator for a revision and resettlement of taxes assessed against the relator for the years 1902 and 1903, upon its earnings, and confirming the assessment of taxes theretofore made for those years. Such writ of certiorari, with the petition on which it was allowed and the order allowing the same, were duly served on the Comptroller. November 17th, 1904, the Comptroller made and filed his return to such writ. A supplemental return was filed December 1st, 1909.

Amos Van Etten, whose office and post-office address is Rondout (Kingston City), N. Y., is the attorney for the Relator.

The Attorney General of the State of New York is the attorney for the Comptroller, the defendant.

2 There has been no change in the parties or their respective attorneys since the commencement of this proceeding except that Clark Williams is now the Comptroller of the State of New York in place of Otto Kelsey, who was Comptroller at the time such writ was issued and served, and Edward R. O'Malley is now Attorney

General of the State of New York in place of John Cunneen, who was Attorney General at the time the return to said writ was made and filed.

The following are copies of the petition, order, writ, return and supplemental return:

Petition for Writ of Certiorari and Notice of Motion.

To the Honorable Otto Kelsey, Comptroller of the State of New York:

You will please take notice, that the petition of the Cornell Steamboat Company, a copy of which is hereto attached, will be presented to a Special Term of the Supreme Court of the State of New York, appointed to be held in and for the County of Rensselaer, at the Court House in the City of Troy, New York, on the 15th day of October, 1904, at the opening of Court on that day or as soon thereafter as Counsel can be heard, and thereon an application will be made for a writ of certiorari to be issued out of the Court in the manner provided by law, directed to you and requiring you to make return to the matters set forth in the said petition.

Dated this 1st day of October, 1904.

AMOS VAN ETTEN,

Attorney for Cornell Steamboat Company, Petitioner.

Rondout, City of Kingston, N. Y.

3 To the Supreme Court of the State of New York:

The Petition of the Cornell Steamboat Company respectfully shows:—

1.

That your Petitioner is a duly organized corporation of the State of New York, organized on the 29th day of March, 1878, under and pursuant to an act to authorize the formation of corporations, passed Februay 17th, 1848, as amended, under the name of the "Cornell Steamboat Company," and the object for which the Company was formed was, "For the purpose of constructing, owning and using "vessels to be employed for hire in towing vessels * * * on "any of the navigable rivers and lakes in or bordering upon the "State of New York or on the high seas or in the various arms of "the seas and rivers running into the same," etc.

In the certificate of incorporation the principal office of the corporation was stated to be the City of New York, subsequently such principal office was changed in the manner provided by law to the City of Kingston, Ulster County, N. Y.

2.

That heretofore and on or about the 31st day of July, 1902, your petitioner made a report to the Comptroller of the State of New York for the year ending June 30th, 1902, in accordance with the re-

quirements of Chapter 361 of the Laws of 1881 as amended, in and by which your petitioner reported that during the year ending on such date, their gross earnings amounted to $377,146.33, and
4 in such report your petitioner omitted earnings from business which originated in one State and terminated in another State, as nearly as the same could be determined by them.

That upon such report the Comptroller levied a tax amounting to $1,885.73 and in his account rendered to the Company for that tax credited a rebate of $942.86, which had theretofore been determined by the Comptroller as due to the Company under prior readjustments, leaving a balance of $942.87, which your petitioner paid to the Treasurer of the State of New York.

That on August 6th, 1903, your petitioner made a report of the gross earnings of the Cornell Steamboat Company for the year ending June 30th, 1903, in which report they reported as follows:

"Gross earnings on business commenced and terminated in the territorial limits of New York derived from towing charges upon the Hudson River (navigable waters of the United States), earned with vessels enrolled and licensed by the United States Government, i. e., business which is regulated by the United States Government and which it is claimed is not taxable by the State of New York, $394,505.59."

That upon such report being filed, there was filed an amendment as follows:

"STATE OF NEW YORK,
County of Ulster, ss:

George Coykendall, being duly sworn, says he is the Vice-president of the Cornell Steamboat Company; that the report of gross earnings in the State of New York, of the Cornell Steamboat Company for the year ending June 30th, 1903, verified by me on September 17th, 1903, should be amended as follows:

That the statement in such report of business commenced and terminated within the territorial limits of the State of New
5 York, derived from towing charges upon the Hudson River is made up largely of towing done in the following manner, as deponent knows from personal knowledge and information derived from the Superintendent of the Company, to-wit: Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that the vessels and boats reported for the up-river tows are taken out to the stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river is in the territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York Harbor, the entire tow, or

the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn.

Deponent further says that nearly all earnings of the Company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is included in the Hudson River and New York Bay and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State.

Deponent further says that he desires to file this affidavit as a correction of the report verified September 17th, 1903, by him, which report was filed with the State Comptroller on or about the 17th day of September, 1903.

GEO. COYKENDALL.

Sworn to before me, this 26th day of September, 1903.
[SEAL.] HERMAN T. WOOD,
Notary Public.

6 STATE OF NEW YORK,
County of Ulster, ss:

Isaac M. North, being duly sworn, says that he is the Superintendent of the Cornell Steamboat Company; that he has read the above affidavit of George Coykendall; that the statements therein, as to the manner in which the business of said company is carried on *is* in all respects true.

ISAAC M. NORTH, *Supt.*

Sworn to before me, this 26th day of September, 1903.
[SEAL.] HERMAN T. WOOD,
Notary Public.

That after the filing of such report, a tax was levied by the Comptroller which, after deduction of rebate, amounted to $986.26, and the same thereafter was paid by the Company to the Comptroller about April, 1904.

3.

On the 14th day of November, 1902, your petitioner by a letter written to Hon. Nathan L. Miller, State Comptroller, by Amos Van Etten, Attorney for the Company, asked for a hearing and readjustment of the tax levied by the Comptroller upon the gross earnings of the Cornell Steamboat Company, and thereafter by letters written by the Comptroller, a hearing was fixed to be had at the office of the Comptroller, in the City of Albany, N .Y., on the 17th day of February, 1903, at 10 o'clock A. M.

That upon such hearing your petitioner attended by Amos Van Etten, its Attorney, objections were made to the jurisdiction of the Comptroller over the business and earnings derived therefrom
7 of the Cornell Steamboat Company, and that he had erroneously made his levy of tax, for the following reasons, which are hereby briefly stated:

That the only business carried on by the Cornell Steamboat Company during the time covered by their report for the year 1902, was that of towing by steam tugs and vessels which were licensed and regulated by the United States Government, canal boats, vessels, barges, scows and other craft on the Hudson River, New York Bay and the Sound and adjacent navigable waters.

That in towing such vessels and cargo, they did not come in contact with the shore or land; that in going up and down the Hudson River they passed through the territorial limits of both the States of New York and New Jersey and that a large part of their business was towing a vessel destined to one State with a cargo destined to another State, and the earnings from such business could therefore not be separated, and for other reasons which were set forth at length in the papers filed by your petitioner with the Comptroller and upon the hearing hereinabove mentioned, and it was claimed by your petitioner that no part of the earnings of the Steamboat Company, so made, were taxable under the Corporation Tax Laws of the State of New York.

4.

That after such hearing permission was given your petitioner to file a brief and the matter was left open so that under date of September 30th, 1903, the question of the assessment for the year 1903 was included in the determination to be made by the Comptroller, and the question of the readjustment of the tax upon the gross earnings for the years ending June 30th, 1902, and
8 June 30th, 1903, were both as a matter of fact considered and determined by the Comptroller.

5.

On the 19th day of September, 1904, the Comptroller made an order of which the following is a copy:

State of New York.

COMPTROLLER'S OFFICE,
ALBANY, *Sept. 19th*, 1904.

Corporation Tax Bureau.

In the Matter of the Application of CORNELL STEAMBOAT COMPANY for a Revision and Resettlement of Taxes Assessed against it under the Provisions of Chapter 908, Laws of New York, 1896, and the Several Acts Amendatory Thereof.

An application having been made by the above named Cornell Steamboat Company, for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending June 30th, 1902, and the

said Comptroller having heard proofs offered on behalf of the said Cornell Steamboat Company, in support of said application, and after due consideration thereof, the Comptroller does determine that the assessment heretofore made against the said Cornell Steam-
9 boat Company does not include taxes which could not have been lawfully demanded, and therefore declines to make any revision or readjustment of the same.

OTTO KELSEY, *Comptroller.*

6.

That at the time the application herein referred to was made the Honorable Nathan L. Miller was then Comptroller of the State of New York and that during the pendency of these proceedings the said Nathan L. Miller resigned as such Comptroller and the Honorable Otto Kelsey is now Comptroller of the State of New York.

7.

Your petitioner alleges that the determination of the Comptroller is erroneous in finding that the assessment made against the Cornell Steamboat Company for the year 1902, and pursuant to his order, 1903, does not include taxes which could not have been lawfully demanded and refusing to revise and readjust the same, in that his determination should have been such tax was without jurisdiction and unlawful.

8.

That no previous application has yet been made for writ of certiorari; that prior to the hearing of this application your petitioner will file a bond with the Comptroller conditioned that petitioner will pay all costs and charges which may accrue against it in the prosecution of the writ, including costs of appeal, in the sum of $500.00.

Wherefore, your Petitioner prays that a writ of certiorari
10 may be issued and allowed by this Honorable Court directed to said Hon. Otto Kelsey as Comptroller of the State of New York, commanding him to certify and return to this Court all the proceedings and decisions had and made in the premises together with the record of all proceedings had before the Comptroller, including all evidence taken by him and all letters and papers relating to the matter to the end that his determination and action may be reviewed and corrected on the merits by this Honorable Court and that your Petitioner may have such other and further relief as to the Court may seem just.

CORNELL STEAMBOAT COMPANY,
By S. D. COYKENDALL, *President.*

STATE OF NEW YORK,
County of Ulster, ss:

Samuel D. Coykendall, being duly sworn, deposes and says that he is the President of the Cornell Steamboat Company, the Petitioner

named in the foregoing petition: that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the Petitioner is a corporation and deponent is an officer thereof, to wit: President.

S. D. COYKENDALL.

Sworn to before me, this 1st day of October, 1904.

[SEAL.] HERMAN T. WOOD,
Notary Public.

Rensselaer Special Term, Oct. 15th, 1904.

Read on Motion and ordered filed in Albany County Clerk's office.

J. V. JACOBS, *Clerk.*

11 *Order for Writ.*

At a Special Term of the Supreme Court of New York, Held in and for the County of Rensselaer, at the Court House in the City of Troy, on the 15th Day of October, 1904.

Present: Hon. Wm. O. Howard, Justice.

In the Matter of the Application of the CORNELL STEAMBOAT COMPANY for a Writ of Certiorari, Directed to Hon. OTTO KELSEY, Comptroller of the State of New York.

On reading and filing the petition of the Cornell Steamboat Company, duly verified by Samuel D. Coykendall, the President thereof, on the 1st day of October, 1904, and it being made to appear that notice of this application has been given to the Comptroller of the State of New York, and there has been filed with him an undertaking required by law in the sum of five hundred dollars, which undertaking has been approved as to form and sufficiency of sureties by a Justice of the Supreme Court, on motion of Lewis E. Carr, Counsel for the Petitioner, and no one appearing,

It is Ordered, that a writ of certiorari, as prayed for in said petition, be issued, directed to Hon. Otto Kelsey, Comptroller of
12 the State of New York, and that said writ be allowed, signed and sealed by the Clerk of this Court in and for the County of Albany.

Enter in Albany County.

Rensselaer Special Term, Oct. 15, 1904.

Granted and ordered entered in Albany County Clerk's office.

J. V. JACOBS, *Clerk.*

Personal service of the within order is admitted this 17th day of October, 1904.

OTTO KELSEY, *Comptroller.*

Undertaking.

Supreme Court.

In the Matter of the Application of the CORNELL STEAMBOAT COMPANY for a Writ of Certiorari, etc.

Whereas, on the 19th day of September, 1904, the Comptroller of the State of New York determined an application made by the Cornell Steamboat Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York for the year ending June 30th, 1902, and declined to make any revision or readjustment of the same, and

13 Whereas, the Cornell Steamboat Company have made a petition in writing for a writ of certiorari to be issued out of the Supreme Court in the manner provided by law to review the determination of the Comptroller above mentioned, and have given notice of an application to the Supreme Court for a writ of certiorari to be issued to review such determination upon the grounds and for the reasons set forth in its petition.

Now therefore, we, the undersigned, do jointly and severally undertake, pursuant to the statute, that if such writ is dismissed or the determination of the Comptroller is affirmed, the Cornell Steamboat Company, the applicant for the writ, will pay all costs and charges which may accrue against it in the prosecution of the writ, including costs of the appeal, not exceeding the sum of Five hundred dollars.

S. D. COYKENDALL.
GEO. COYKENDALL.

Dated, October 1st, 1904.

STATE OF NEW YORK,
County of Ulster, ss:

On this 1st day of October, in the year one thousand nine hundred and four (1904), before me, the subscriber, personally appeared Samuel D. Coykendall and George Coykendall, to me known to be the same persons described in and who executed the within instrument and they severally acknowledged that they executed the same.

[SEAL.] HERMAN T. WOOD,
Notary Public.

STATE OF NEW YORK,
County of Ulster, ss:

Samuel D. Coykendall and George Coykendall, above named, being severally duly sworn, each for himself, says that he is
14 a resident of and a freeholder within this State, and is worth One thousand dollars over all the debts and liabilities which

he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

S. D. COYKENDALL.
GEO. COYKENDALL.

Sworn to before me, this 1st day of October, 1904.
[SEAL.] HERMAN T. WOOD,
Notary Public.

I approve of the foregoing undertaking and of the sureties therein named.
Dated, Oct. 1, 1904.

JAMES A. BETTS,
Justice of the Supreme Court.

Writ of Certiorari.

To the People of the State of New York, on the Relation of the Cornell Steamboat Company, a corporation, to Hon. Otto Kelsey, Comptroller of the State of New York:

Whereas, we have been informed by the petition of the Cornell Steamboat Company, verified on the 1st day of October, 1904, that said Petitioner is a duly organized corporation of the State of New York, incorporated for the purpose of constructing, owning and using vessels to be employed for hire in towing vessels on the navigable waters or high seas or rivers running into the seas, in or bordering upon the State of New York, and that said corporation for the years 1902 and 1903 made a report of their gross earnings for such years, upon which the Comptroller of the State of New York levied franchise taxes, which have been paid by the said Company, and

Whereas, after the payment of such taxes and on or about the 17th day of February, 1903, a readjustment of such taxes was asked by the said Cornell Steamboat Company, and a hearing upon such question then had before the Comptroller at his office in the City of Albany, New York, and that on such hearing and by papers filed with the Comptroller it was made to appear, that the only business carried on by the Cornell Steamboat Company during the time covered by their report for the year 1902, was that of towing by steam tugs and vessels which were licensed and regulated by the United States Government, canal boats, vessels, barges, scows and other craft on the Hudson River, New York Bay and the Sound and adjacent navigable waters.

That in towing such vessels and cargo, they did not come in contact with the shore or land; that in going up and down the Hudson River they passed through the territorial limits of both the States of New York and New Jersey, and that a large part of their business was towing a vessel destined to one State with a cargo destined to another State, and the earnings from such business could therefore

not be separated, and for other reasons which were set forth at length in the papers filed by your petitioner with the Comptroller and upon the hearing hereinabove mentioned, and it was claimed by the Company that no part of the earnings of the Steamboat Company so made, were taxable under the Corporation Tax Laws of the State of New York.

And whereas, on the 19th day of September, 1904, the Comptroller made an order of which the following is a copy:

16 "STATE OF NEW YORK,
COMPTROLLER'S OFFICE,
ALBANY, *Sept.* 19*th*, 1904.

Corporation Tax Bureau.

In the Matter of the Application of CORNELL STEAMBOAT COMPANY for a Revision and Resettlement of Taxes Assessed Against it under the Provisions of Chapter 908, Laws of New York, 1896, and the Several Acts Amendatory Thereof.

An application having been made by the above named Cornell Steamboat Company, for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending June 30th, 1902, and the said Comptroller having heard proofs offered on behalf of the said Cornell Steamboat Company, in support of said application, and after due consideration thereof, the Comptroller does determine that the assessment heretofore made against the said Cornell Steamboat Company does not include taxes which could not have been lawfully demanded, and therefore declines to make any revision or readjustment of the same.

OTTO KELSEY, *Comptroller.*"

And whereas, an order has been duly made at a Special Term of this Court directing that a writ of certiorari issue out of this Court to review the acts and proceedings of the Comptroller in the matter in controversy.

17 Now, we being willing to be certified of your proceedings as such Comptroller in readjusting the taxes made upon the gross earnings by the Cornell Steamboat Company for the years 1902 and 1903, and all things relating thereto, do command you that within twenty days after the service hereof, you do certify a return to us at the office of the Clerk of the County of Albany, in the City of Albany, New York, all and singular your proceedings, decisions and actions in the premises, with the dates thereof and all and singular the evidence, documents, records, papers and proceedings before you or your predecessor in office, or which were submitted to you or either of you, concerning the said matter, or papers offered or filed with you as such Comptroller, or in the Comptroller's office in relation thereto, together with your determination as such Comptroller to the end that your decision and action as such Comptroller may be reviewed and corrected on the merits by this Court

in the manner provided by law, and that the action or determination of the Comptroller of the State of New York in the matter herein referred to may be reviewed or corrected according to law as to the Court may seem just.

Witness, the Hon. W. O. Howard, one of the justices of the Supreme Court of the State of New York, on the 15th day of October, 1904.

[L. S.] JOHN FRANEY, *Clerk.*

AMOS VAN ETTEN,
Attorney for Relator.

The foregoing writ is allowed by me.

W. O. HOWARD,
Jus. Sup. Ct.

18 *Return.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. THE CORNELL STEAMBOAT COMPANY,

vs.

OTTO KELSEY, as Comptroller of the State of New York.

The above named defendant makes return to the writ of certiorari herein as follows:

First. He admits the truth of the allegations contained in paragraphs 1, 4, 5, 6 and 8 of the petition herein.

Second. He admits that the relator herein made a report on or about the 31st day of July, 1902, for the year ending June 30th, 1902, to the Comptroller of the State of New York; that the said Comptroller levied against the said relator the tax mentioned in paragraph 2 of said petition; that the said relator paid said tax after rebate to the treasurer of the State of New York; that said relator made a report and an amended report to the Comptroller of the State of New York for the year ending June 30th, 1903; that the tax mentioned in paragraph 2, for the year 1903 was levied by said Comptroller and paid by said relator; that an application for a hearing and readjustment herein was made to and granted by said Comptroller; that upon said hearing, the said relator appeared by its attorney.

19 Third. He denies the truth of each and every allegation of said petition except as the same is hereby expressly admitted.

Fourth. In addition to the matters hereinbefore referred to, he herewith returns the evidence taken on the hearing to which are annexed the several exhibits therein referred to.

Fifth. He further alleges that the taxes mentioned in said petition were regularly, legally and duly imposed, settled and collected, and that petitioner is not justly aggrieved thereby.

In witness whereof, the Comptroller has hereunto set his hand and official seal this 17th day of November, 1904.

[L. S.] OTTO KELSEY, *Comptroller.*

Report of the Gross Earnings in the State of New York of the Cornell Steamboat Company for the Year Ending June 30, 189–, *Made in Accordance with the Requirements of Chapter* 361, *Laws of* 1881, *as Amended.*

Office of the Cornell Steamboat Company,

RONDOUT, N. Y., *July* 31*st,* 1902.

1. Gross Earnings, not interstate business, derived from all sources during the above period.		$377,146.33
2. For Tolls and Transportation.....		$ .....
3. For Telegraph and Telephone business....		$ .....
4. For Express business.....		$ .....
Taxable gross receipts.....		$377,146.33

This report includes the gross earnings received from lines of road leased by —— —— Company, and for which said Company is liable to the State for the tax on gross earnings.

5. Names of Companies leased: None.

STATE OF NEW YORK,
County of Ulster, ss:

On this 31st day of July, A. D. 1902, personally appeared before me, a Notary Public in and for the County of Ulster, H. S. Coykendall, Treasurer of the Cornell Steamboat Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct.

H. S. COYKENDALL, *Treasurer.*

Sworn to and subscribed before me, the day and year aforesaid.

[L. S.] P. E. SCHOONMAKER,
Notary Public.

21 STATE OF NEW YORK,
Comptroller's Office:

In the Matter of the Application of the CORNELL STEAMBOAT COMPANY for a Revision and Readjustment of Taxes Assessed under the Provisions of Chapter 908, Laws of 1896, and the Acts Amendatory Thereof.

Rehearing Held at the Office of the State Comptroller, February 17th, 1903, Before Honorable Nathan L. Miller, State Comptroller.

AMOS VAN ETTEN appeared for the Company, and being duly sworn, testified as follows:

The Cornell Steamboat Company is organized under the act of 1848, for the purpose of towing vessels, boats, etc., upon the waters

of the navigable rivers, and their business is confined entirely to towing vessels upon the Hudson River, in the harbor, and we also tow to Boston and points in the Sound. We say that the Hudson River is an arm of the sea—our vessels are all licensed under the United States Government; our men who operate them are engineers and pilots and are all licensed by the United States Government, and, in fact, the United States Government controls the whole situation, and the question naturally arises why the State of New York should impose a tax upon our business, which is not like a ferry company or a freight company or passenger line; we simply
22 go to the vessel which lies alone in the water, throw them a line and move them to some other point. The tax has been imposed and we say that the State of New York has no jurisdiction over the navigable waters like the Hudson River to impose a tax upon the business of towing vessels, boats, barges, etc.

By the COMPTROLLER:

Q. Now the nature of the business you do probably does not appear in the records—you probably want to submit proof as to just exactly the nature of the business that you did and how it was transacted?

A. Well, I think I am competent to state that.

Q. You have actual knowledge?

A. I have actual knowledge.

Statement by COUNSEL:

I am attorney for the Cornell Steamboat Company and have a knowledge of their business; have been for a number of years attorney and connected with them; the earnings included in the report for the last year were derived entirely from business, which is towing boats, barges and other vessels upon the waters of the Hudson River in the bay; the business consists in towing boats, which are all licensed by the United States Government and are operated by masters, pilots and engineers who are licensed by the United States Government; they tow boats, barges, etc., lying in the waters of the Hudson River and adjacent waters; moving them by towing on a line or otherwise to some other point and in that way earnings are made; on loaded vessels the charge is based upon the tonnage.

By the COMPTROLLER:

Q. Can you tell what part of the earnings is derived from the business done by the two tugs?

23 A. I think the statement which is filed shows what that was—that is, move from one State to another.

Q. So in your report filed here you did not include earnings from the tugs, operating between New York harbor and points outside the State?

A. No,—business which was en route from one State to another has been deducted and called interstate business.

Q. So you base your claim that you are not taxable, so far as the business done in this State is concerned, upon the proposition that

your business is entirely done in New York harbor and Hudson River, which you claim is a part of the ocean?

A. Yes.

Q. And that is under——

A. The federal government.

Q. You claim it is not taxable?

A. Yes.

By Mr. MERRILL:

Q. Mr. Van Etten, under what laws is this corporation organized?

A. Act of 1848.

Q. Of New York?

A. Of New York.

Q. And for what was its capital stock issued?

A. Invested in steam vessels, I take it.

Q. Naturally.

A. Yes, of course they have an office building; the offices are in Rondout, City of Kingston.

Q. At what point are these vessels registered?

A. Albany and New York.

Q. All of them?

A. Yes.

Q. And where are they in the winter?

A. Some operate in New York, some are laid up at the repair shops of the company at Rondout and some lay in Rondout.

Q. None of them are continuously employed without the State?

A. Well, no, there are some of them that are continuously employed in New York harbor; now I might say there might be
24 some small item in these earnings within the State which is office rent; there is a newspaper company that has an office in the building; the business itself is as I have described.

By the COMPTROLLER:

Q. You own some real estate?

A. The office building and shop building.

Q. And you rent a part of the office building?

A. Yes, I think that the newspaper company occupy a portion of the building and I do not recall any other tenant now.

Q. And the only receipts then that you have, other than from the business you described, is from your rent that you get from this newspaper company?

A. There might be some rent from that.

By Mr. MERRILL:

Q. Do you know, Mr. Van Etten, who has control of the waters of New York harbor below Spuytenduyvil Creek, and hence to the ocean, under the agreement entered into by the State of New York and the State of New Jersey?

Return duly filed and entered in the office of the Clerk of Albany County on the 17th day of November, 1904.

Supplemental Return.

STATE OF NEW YORK,
County of Ulster, ss:

George Coykendall, being duly sworn, says that he is the Vice-president of the Cornell Steamboat Company; that the report of gross earnings in the State of New York, of the Cornell
25 Steamboat Company for the year ending June 30th, 1903, verified by me on September 17th, 1903, should be amended as follows: That the statement in such report of business commenced and terminated within the territorial limits of the State of New York, derived from towing charges upon the Hudson River, is made up largely of towing done in the following manner, as deponent knows from personal knowledge and information derived from the Superintendent of the company, to wit: Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken to the stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river is in the territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn.

Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State.

Deponent further says that he desires to file this affidavit as a correction of the report verified September 17th, 1903, by him,
26 which report was filed with the State Comptroller on or about the 17th day of September, 1903.

GEO. COYKENDALL.

Sworn to before me, this 26th day of September, 1903.

HERMAN T. WOOD,
Notary Public.

STATE OF NEW YORK,
County of Ulster, ss:

Isaac M. North, being duly sworn, says that he is the Superintendent of the Cornell Steamboat Company, that he has read the above affidavit of George Coykendall; that the statements therein, as to the manner in which the business of said company is carried on, *is* in all respects true.

ISAAC M. NORTH, *Supt.*

Sworn to before me, this 26th day of September, 1903.

HERMAN T. WOOD,
Notary Public.

Report of the Gross Earnings in the State of New York of the Cornell Steamboat Company, for the Year Ending June 30th, 1903, Made in Accordance with the Requirements of Chapter 361, Laws of 1881, as Amended.

Office of the Cornell Steamboat Company,

RONDOUT, N. Y., *August 6th,* 1903.

27	1. Gross earnings on business commenced and terminated in the territorial limits of New York, derived from towing charges upon the Hudson River (navigable waters of the United States), earned with vessels enrolled and licensed by the U. S. Government, i. e., business which is regulated by the U. S. Government, and which it is claimed is not taxable by the State of New York	$394,505.59
	2. For tolls and transportation	As above.
	3. For telegraph and telephone business	None.
	4. For express business	None.
	Gross receipts, as above stated	$394,505.59
	5. Names of companies leased	None.

STATE OF NEW YORK,
County of Ulster, ss:

On this 17th day of September, 1903, personally appeared before me, a notary public in and for the County of Ulster, George Coykendall, Vice-president of the Cornell Steamboat Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct. That the reason why this verification is made by the Vice-president, is that the Treasurer is absent from the State of New York.

GEO. COYKENDALL,
Vice-President.

Subscribed and sworn to before me, the day and year aforesaid.

HERMAN T. WOOD,
Notary Public.

28 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. THE CORNELL STEAMBOAT COMPANY,
against
OTTO KELSEY, as Comptroller of the State of New York.

The supplemental return of Otto Kelsey, Comptroller of the State of New York, to the writ of certiorari issued out of this court on the 15th day of October, 1904, a copy of which writ was returned with the original return to said writ, which was filed in the Albany County Clerk's office November 17, 1904.

By virtue of and in obedience to the said writ of certiorari, I do hereby certify and return to the Supreme Court the affidavit of George Coykendall, Vice-president of the Cornell Steamboat Company, verified September 26, 1903, and the affidavit of Isaac M. North, Superintendent of the said Cornell Steamboat Company, verified September 26, 1903, and the report of the gross earnings in the State of New York of the Cornell Steamboat Company for the year ending June 30, 1903.

In witness whereof, I have hereunto set my hand and seal this 19th day of November, 1909.

[L. S.] CLARK WILLIAMS,
Comptroller of the State of New York.

Supplemental Return duly filed and entered in the office of the Clerk of Albany County, on the 30th day of November, 1909.

29 *Stipulation waiving Certification.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of CORNELL STEAMBOAT COMPANY, Relator,
against
OTTO KELSEY, as Comptroller of the State of New York, Defendant.

We, the undersigned, attorneys for the respective parties in the within special proceeding, do hereby stipulate that the foregoing case, including the petition for writ of certiorari, order granting such writ, writ of certiorari, return and supplemental return thereto, with papers thereto attached, are correct copies of the originals of such papers now on file in the Albany County Clerk's office and of the whole thereof, and certification thereof by the Clerk of Albany County is hereby waived.

Dated, Albany, N. Y., July 21st, 1910.

AMOS VAN ETTEN,
Attorney for Relator.
EDWARD R. O'MALLEY,
Attorney General, Attorney for Defendant.

30 *Order of Substitution.*

At a Special Term of the Supreme Court of the State of New York, Held in and for the County of Albany, at Supreme Court Chambers in the County Building, in the City of Albany, N. Y., on the 6th Day of February, 1912.

Present: Hon. Alden Chester, Justice.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, ex Rel. CORNELL STEAMBOAT COMPANY, Relator,
against
OTTO KELSEY, as Comptroller of the State of New York, Defendant.

On reading and filing the annexed stipulation for the substitution of William H. Sohmer, the present Comptroller of the State of New York, in place of Otto Kelsey, former Comptroller, as the defendant in this proceeding:

It is, on motion of Lewis E. Carr, Counsel for the Relator,

Ordered, that William H. Sohmer be, and he hereby is, substituted as the defendant herein in the place of Otto Kelsey, and that this proceeding be hereafter continued against said William H. Sohmer, as Comptroller of the State of New York.

Enter:

ALDEN CHESTER, *J. S. C.*

31 *Order Appellate Division.*

At a Term of the Appellate Division Held in and for the Third Judicial Department at the Rooms of said Court in the City of Albany, Commercing on the 14th Day of November, 1911.

Present: Hon. Walter Lloyd Smith, Presiding Justice; Hon. John M. Kellogg, Hon. Albert H. Sewell, Hon. James A. Betts, Hon. James W. Houghton, Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK, ex Rel. CORNELL STEAMBOAT COMPANY, Relator,
against
OTTO KELSEY, as Comptroller of the State of New York, Respondent.

A writ of certiorari having been issued in this proceeding to review the refusal of the Comptroller of the State of New York to revise or readjust the account of relator's taxes under section 184 of the Tax Law of the State of New York for the years 1902 and 1903, and a return to same having been filed by the Comptroller herein, on the 17th day of November, 1904, and supplemental return on December 1st, 1909, and the proceeding herein having come

on for hearing at this term of this court, and after hearing Lewis E. Carr, Esq., of counsel for the relator, and Franklin Kennedy, Esq., of counsel for the respondent, and due deliberation having been had,

32 Now, on motion of Thomas Carmody, Attorney General, it is

Ordered, that the determination of the Comptroller be unanimously confirmed with $50.00 costs and disbursements.

JOSEPH H. HOLLAND, *Clerk.*

Notice of Appeal to Court of Appeals.

Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK, ex Rel. CORNELL STEAMBOAT COMPANY, Relator,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Defendant.

Take notice, that the above-named relator, Cornell Steamboat Company, hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, in the Third Judicial Department, which confirmed, with $72.00 costs and disbursements, the determination of the Comptroller denying the application of the relator for a revision and readjustment of the taxes imposed on the relator under section 184 of the Tax Law for the years 1902 and 1903, and prays that

33 such order and judgment may be reversed and set aside and the Comptroller may be required to revise and readjust the taxes so imposed on the relator in accordance with the relator's application therefor.

Dated, February 16th, 1912.

AMOS VAN ETTEN,
Attorney for Relator.

To William J. Grattan, County Clerk of Albany County, and Thomas Carmody, Attorney General, Attorney for Defendant.

Supreme Court.

THE PEOPLE ex Rel. CORNELL STEAMBOAT COMPANY, Relator-Appellant,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Defendant-Respondent.

STATE OF NEW YORK,
County of Albany, ss:

Lewis E. Carr, being duly sworn, says he is counsel for the above-named appellant and as such argued the above-entitled case in the

Appellate Division of the Supreme Court, and that no opin-
34 ion was filed by said Appellate Division on the decision rendered by it confirming the decision of the Comptroller that is the subject of review herein.

LEWIS E. CARR.

Sworn to before me March 29th, 1912.

JOHN E. MacLEAN,
Notary Public.

STATE OF NEW YORK,
Albany County Clerk's Office, ss:

I, William J. Grattan, Clerk of the County of Albany and of the Supreme Court therein, do hereby certify that I have compared the foregoing writ of certiorari, the papers on which the same was granted, return thereto, order of Appellate Division thereon and notice of appeal to the Court of Appeals therefrom with the originals being and remaining on file in my office, and that the same are true and correct transcripts of such originals and of the whole thereof.

I further certify that the notice of appeal to the Court of Appeals herein, with the undertaking to perfect such appeal, were filed in my office February 19th, 1912.

In witness whereof I have hereunto set my hand and official seal this 12th day of April, 1912.

[L. S.] WILLIAM J. GRATTAN, *Clerk.*

35 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 21st day of June, in the Year of Our Lord One Thousand Nine Hundred and Twelve, before the Judges of said Court.

Witness: The Hon. Edgar M. Cullen, Chief Judge, presiding; R. M. Barber, Clerk.

Remittitur June 22nd, 1912.

36 THE PEOPLE, &c., ex Rel. CORNELL STEAMBOAT CO.,
Appellant,
ag'st
WILLIAM H. SOHMER, as Comptroller, &c., Respondent.

Be it remembered, that on the 16th day of April, in the year of our Lord one thousand nine hundred and twelve, Cornell Steamboat Company, the appellant in this proceeding, came here into the Court of Appeals, by Amos Van Etten, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the

Third Judicial Department. And William H. Sohmer, as Comptroller, &c., the respondent in said proceeding afterwards appeared in said Court of Appeals by Thomas Carmody, Attorney General, his attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

37 Whereupon, the said Court of Appeals having heard this cause argued by Mr. Lewis E. Carr, of counsel for the appellant, and by Mr. Franklin Kennedy, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

38 Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals.

Clerk's Office.

ALBANY, *June 22nd*, 1912.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

39 At a Special Term of the Supreme Court, Held in and for the County of Albany at Supreme Court Chambers in the City of Albany on the 17th Day of July, 1912.

Present: Hon. William P. Rudd, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, ex Rel. CORNELL STEAMBOAT COMPANY, Relator,
against
WILLIAM SOHMER, as Comptroller of the State of New York, Respondent.

The above named relator having appealed to the Court of Appeals of the State of New York from a final order in a certiorari proceeding

brought by relator, entered and filed in the office of the Clerk of the Appellate Division for the Third Department on the 12th day of January, 1912, and entered in the office of the Clerk of Albany County on the same day, whereby it was ordered that the determination of the Comptroller in refusing to revise or readjust the account of taxes due from the relator herein under Section 184 of the Tax Law of the State of New York for the years 1902 and 1903,
40 be unanimously confirmed with $50.00 costs and disbursements; and the said appeal having been duly argued at the Court of Appeals and after due deliberation, the Court of Appeals having ordered and adjudged the said final order so appealed from as aforesaid be unanimously affirmed with costs; and having ordered and adjudged that proceedings herein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein and upon motion of Thomas Carmody, Attorney-General, it is

Ordered, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter:

WM. P. RUDD, *J. S. C.*

41 STATE OF NEW YORK,
County of Albany, ss:

I, William J. Grattan, Clerk of the County of Albany, and of the Supreme Court therein, the same being a court of record, do hereby certify that I have compared the foregoing return on appeal, remittitur from the Court of Appeals, and order of the Supreme Court making the Judgment of the Court of Appeals the Judgment of the Supreme Court, with the originals being and remaining on file in my office, and that the same are true and correct transcripts of said originals and of the whole thereof.

In witness whereof, I have hereunto set my hand and official seal at the city of Albany this 30 day of Sept., 1912.

[Seal Albany County, July, 1847.]

WM. J. GRATTAN,
County Clerk of Albany County.

42–44 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

[Seal United States District Court, N. Dist. of New York.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The People of the State of New York on the relation of Cornell Steamboat Company, appellant, against

William H. Sohmer, as Comptroller of the State of New York, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, immunity or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Cornell Steamboat Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
45 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 21st day of October, 1912, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the said Supreme Court, the 12th day of October in the year of our Lord 1912.

[Seal United States District Court, N. Dist. of New York.]

W. S. DOOLITTLE,
Clerk of the District Court of the United States
for the Northern District of New York.

Allowed by me Oct. 2, 1912.

EDGAR M. CULLEN,
Chief Judge C't of Appeals.

46 [Endorsed:] The Supreme Court of the United States. The People of the State of New York, ex rel. Cornell Steamboat Company, Plaintiff in Error, against William H. Sohmer, as Comptroller of the State of New York, Defendant in Error. (Original.) Writ of Error. Amos Van Etten, Attorney for Plaintiff in Error, Kingston, N. Y. Filed Oct. 16, 1912. Clerk's Office, Albany County, N. Y.

47 The Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of THE CORNELL STEAMBOAT COMPANY, Plaintiff in Error,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Defendant in Error.

To the Honorable Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York:

The petition of the Cornell Steamboat Company respectfully shows: That heretofore and on the 19th day of September, 1904, Otto Kelsey, then Comptroller of the State of New York, by an order then made denied an application made by the petitioner herein for a revision and resettlement of taxes heretofore assessed against it by the Comptroller of the State of New York upon its earnings for the year 1902, $942.87, and for the year 1903, $986.26, which were so assessed under the provisions of Section 184 of the Tax Law of the State of New York, holding and deciding the taxes so assessed did not include those which could not be lawfully demanded by the State of New York;

That on the 15th day of October, 1904, a writ of certiorari was granted by the Supreme Court of the State of New York on the application of the petitioner herein to review such determination and have the same reversed, in which application for such writ it was alleged the earnings so taxed were not taxable under the corporation tax law of the State of New York because they were derived from the towing of boats and barges on the Hudson river and in and about New York harbor by means of tugs and vessels
48 which were licensed and regulated as to the vessels and the men employed thereon by the United States government and therefore such taxes did include those that could not be lawfully demanded by the State of New York because they were of an interstate character;

That the record made up of the petition for such writ and the return thereto, which included all the papers before the Comptroller as the basis for such taxes and his decision with reference thereto, was heard before and by the Appellate Division of the Supreme Court of the State of New York in and for the Third Judicial Department thereof, and that court, on the 14th day of November, 1911, rendered its decision adversely to the claim of the petitioner herein, which has been hereinbefore stated, and confirmed the decision and determination of the Comptroller with reference to such taxes;

That the petitioner herein thereupon, in due form of law, in accordance with the law and practice in such cases, appealed from the order so made by the Appellate Division of the Supreme Court of the State of New York to the Court of Appeals of the State of New York, which Court, under the laws of that State, has an appellate jurisdiction separate from, and independent of, the appellate jurisdiction of the Supreme Court; that in accordance with, and

conformity to, the law and practice in that State, the Supreme Court, in due form of law, upon such appeal having been taken, transmitted to said Court of Appeals the record in said case which was before the Appellate Division of said Supreme Court; that such case was thereupon argued in and before said Court of Appeals and therein the claim and contention of the petitioner herein was that the order of said Appellate Division of the Supreme Court was erroneous for the reason that such taxes were erroneously and unlawfully assessed against it in that the earnings upon which said taxes were assessed were of an interstate character and could not therefore be the basis of any tax assessed or imposed by the
49 State of New York as earnings of that character were excepted by the Section of the Tax Law of the State of New York under which said taxes were assessed and, whether excepted or not, were subject to the exclusive regulation and control of the government of the United States; that such Court of Appeals, on the 21st day of June, 1912, by its decision then rendered affirmed the order of the Appellate Division of the Supreme Court so appealed from and thereby confirmed the assessment of said taxes by the Comptroller and decided the claim and contention of the petitioner herein, the appellant in said Court, adversely thereto; that upon such decision by said Court of Appeals a remittitur therefrom was duly issued in said case and the record thereof was in and by it remitted and returned to the Supreme Court of the State of New York, to be there proceeded upon according to law; that upon such remittitur from said Court of Appeals the Supreme Court of the State of New York, on the 17th day of July, 1912, by its order then granted, made the said order and judgment of the Court of Appeals the order and judgment of that Court; and that such order and judgment thereupon became and now is a final order and judgment of that court in the case entered in the County of Albany in that State, and by the decision, order and remittitur of the Court of Appeals and the order of the Supreme Court thereon is such final order and judgment of the highest court of the State of New York in which a decision in said case could or can be had.

Your petitioner further shows that a Federal question was made and presented in said case, in that the earnings of your petitioner for the years 1902 and 1903 upon and for which the taxes were assessed and imposed by the Comptroller which were the subject of review in said case, were exclusively derived from the business of towing boats and barges upon the Hudson river between the
50 cities of Troy and Albany and New York and in and about New York bay by means of tugs and other steam vessels; that the place where such business was done was exclusively navigable water of the United States which was at the time such earnings were derived under the exclusive dominion, control and regulation of the Government of the United States; that the tugs and other vessels with which the towing was done were vessels of the United States enrolled and licensed under and in accordance with the laws of the United States; and that such tugs and other vessels were, while engaged in such towing business, officered and manned by engineers

and other employees licensed under and in conformity with the laws of the United States. Earnings thus derived were and are of an interstate character because the opportunity therefor was and is furnished by the United States and not by the State of New York, and the means and instrumentalities used in such business were and are required to be and were and are in fact pursuant to, and in conformity with, the laws and regulations of the government of the United States. Earnings thus derived were and are not of an intrastate character because the business producing them was and is not done under or subject to the laws and regulations of the State of New York. If such earnings were not of an intrastate character they could not be made the basis of a tax, license fee or other exaction assessed or imposed by the State of New York against or upon your petitioner. Hence the question presented for decision in the case was whether such earnings were of an interstate or intrastate character and the determination of that question was necessary in the decision of the case. The decision thereon by the highest court of the State of New York was adverse to the claim of the petitioner that such earnings were of an interstate character, which decision it is the claim and contention of your petitioner was erroneous
51 and presents a Federal question which may and should be passed upon and determined by the Supreme Court of the United States.

Your petitioner further shows that under the laws of the State of New York there is no Chief Justice of the Supreme Court of that State; that the appellate jurisdiction of the Supreme Court of that State is vested in four Appellate Divisions and is limited territorially within the State to defined departments thereof; that the Court of Appeals of that State has appellate jurisdiction superior to that of the Appellate Divisions of the Supreme Court; that such Court of Appeals consists of a Chief Judge and six Associate Judges; that the orders and judgments of that Court to become the orders and judgments of the Supreme Court require formal action of the Supreme Court making them the orders and judgments of that Court; and that because of the matters herein stated application is herein made to the Chief Judge of the Court of Appeals for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York to bring before said Supreme Court of the United States the record in this case.

Wherefore, your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of the State of New York in said case and prays that a writ of error to said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved; and that the errors complained of may be reviewed in the Supreme Court of the United States and the order and judgment aforesaid of said Supreme Court of the State of New York may be reversed.

Dated September 13th, 1912.

CORNELL STEAMBOAT COMPANY,
By AMOS VAN ETTEN,
Its Attorney in Law and in Fact.

52 [Endorsed:] The Supreme Court of the State of New York. The People of the State of New York, ex rel. Cornell Steamboat Company, Plaintiff in Error, against William H. Sohmer, as Comptroller of the State of New York, Defendant in Error. (Original.) Petition for Writ of Error. Amos Van Etten, Attorney for Plaintiff in Error, Kingston, N. Y. Received & read Oct. 2, 1912. Edgar M. Cullen, Chief Judge C't of Appeals. Filed Oct. 16, 1912. Clerk's Office, Albany County, N. Y.

53 UNITED STATES OF AMERICA, *ss:*

To William H. Sohmer, as Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of New York in the County of Albany in that State, wherein The People of the State of New York, on the relation of Cornell Steamboat Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the order and judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, this 2 day of Oct. in the year of our Lord one thousand nine hundred and twelve.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals
of the State of New York.

54 The Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK el Rel. CORNELL STEAMBOAT COMPANY, Plaintiff in Error,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Defendant in Error.

STATE OF NEW YORK,
County of Albany, ss:

Lewis E. Carr, Jr., being duly sworn, says, he is over the age of twentyone years; that on the 14th day of October, 1912, he served on the above named defendant in error the citation herein, hereto annexed, by delivering to and leaving with E. S. Harris, Deputy Comptroller, a true copy thereof, at the same time exhibiting to him said original citation; that on the 15th day of October, 1912, he served such citation on the Attorney-General of the State of New York who had been the attorney for the defendant in error in the State Court herein by delivering to and leaving with August Merrill,

deputy attorney-general, a true copy thereof, and he at the same time requested an admission of such service on said original citation which was refused. LEWIS E. CARR, JR.

Subscribed and sworn to before me this 15th day of October, 1912.
WM. F. RATHBONE,
Notary Public, Albany County.

55 [Endorsed:] The Supreme Court of the State of New York. The People of the State of New York ex rel. Cornell Steamboat Company, Plaintiff in Error, against William H. Sohmer, as Comptroller of the State of New York, Defendant in Error. (Original.) Citation with proof of service. Amos Van Etten, Attorney for Plaintiff in Error, Kingston, N. Y. Copy of the within citation received this — day of ——, A. D. 1912, at the office of the Attorney General of the State of New York. —— ——, Attorney General. Filed Oct. 16, 1912. Clerk's Office, Albany County, N. Y.

56 The Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, on the Relation of CORNELL STEAMBOAT COMPANY, Plaintiff in Error,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Defendant in Error.

Know all men by these presents that we, Cornell Steamboat Company, as principal, and S. D. Coykendall and Edward Coykendall as surety, are held and firmly bound unto William H. Sohmer, as Comptroller of the State of New York, in the sum of one thousand dollars, to be paid to the said obligee, his successor, representatives and assigns; to the payment of which, well and truly to be made, we bind ourselves, our successors, heirs and personal representatives jointly and severally by these presents.

Sealed with our seals and dated this 12th day of September, A. D. 1912.

Whereas the above-named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the order and judgment rendered against it in the above entitled action by the Supreme Court of the State of New York, and entered in the County of Albany in that State.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea then this obligation shall be void; otherwise to remain
57 in full force and effect.

[Seal Cornell Steamboat Company, State of New York.]

CORNELL STEAMBOAT COMPANY,
By S. D. COYKENDALL, *Pres't.*
S. D. COYKENDALL.
E. COYKENDALL.

Attest:
FRED'K COYKENDALL, *Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this 13th day of September, A. D. 1912, personally appeared before me Frederick Coykendall who being duly sworn deposes and says that he is the Secretary of Cornell Steamboat Company, the above named obligor and is acquainted with the corporate seal of said company; that the seal attached to the foregoing abligation is such corporate seal; that the same was attached thereto by him by authority of the board of directors of said Company; and that he signed the same as Secretary by the like authority.

[Seal Morris Bixby, Notary Public, Westchester County.] N. Y.]

MORRIS BIXBY,
Notary Public, Westchester Co.

Certificate filed in New York Co. Register No. 4220 N. Y. County No. 60.

STATE OF NEW YORK,
County of Ulster, ss:

On this 12th day of September, 1912, before me personally appeared S. D. Coykendall and Edward Coykendall to
58 me known to be the persons described in and who executed the foregoing bond, and acknowledged that they executed the same as their free act and deed.

[Seal Hermon T. Wood, Notary Public, Kingston, Ulster Co., N. Y.]

HERMON T. WOOD,
Notary Public, Ulster Co., N. Y.

I hereby approve the foregoing bond and surety this 2 day of October, 1912.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

59 [Endorsed:] The Supreme Court of the State of New York. The People of the State of New York ex rel. Cornell Steamboat Company, Plaintiff in Error, against William H. Sohmer, as Comptroller of the State of New York, Defendant in Error. (Original.) Bond on Writ of Error. Amos Van Etten, Attorney for Plaintiff in Error, Kingston, N. Y. Filed Oct. 16, 1912. Clerk's Office, Albany County, N. Y.

60 The Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of CORNELL STEAMBOAT COMPANY, Plaintiff in Error,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Defendant in Error.

The above entitled matter coming on to be heard upon the petition of the Plaintiff in Error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York, and upon examination of said petition and the record in said matter and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be, and is hereby allowed to the Supreme Court of the State of New York from the Supreme Court of the United States and that the bond presented by said petitioner be, and the same hereby is, approved.

Dated Oct. 2, 1912.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

61 [Endorsed:] The Supreme Court of the State of New York. The People of the State of New York, ex rel. Cornell Steamboat Company, Plaintiff in Error, against William H. Sohmer, as Comptroller of the State of New York, Defendant in Error. (Original.) Order Allowing Writ of Error. Amos Van Etten, Attorney for Plaintiff in Error, Kingston, N. Y. Filed Oct. 16, 1912. Clerk's Office, Albany County, N. Y.

62 The Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of CORNELL STEAMBOAT COMPANY, Plaintiff in Error,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Defendant in Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of New York in the above entitled matter there is manifest error in this, to wit:

First. The Court erred in holding that the earnings of the Cornell Steamboat Company, the plaintiff in error, for the years 1902, and 1903, upon which a tax was imposed by the Comptroller of the State of New York under Section 184 of the Tax Law of the State of New York, which were derived from the towing of boats on the Hudson

river with vessels licensed and enrolled under and in accordance with the laws of the United States, manned and operated by men licensed under and pursuant to the laws of the United States, were such earnings as the State of New York had jurisdiction and right to tax, and in refusing to hold that such earnings were of an interstate character and so, by said Section 184 of the Tax Law of the State of New York, exempt from the tax which might be imposed under that section.

Second. The Court erred in holding that earnings derived by the plaintiff in error from its towing business conducted on the
63 Hudson river and so on navigable water of the United States, with steamers and tugs licensed and enrolled under and in accordance with the laws of the United States and were vessels of the United States which were manned and operated by men also licensed under and in accordance with the laws of the United States, were not earnings of an interstate character and so protected from taxation or other burden imposed by the State of New York for the privilege of doing such business within the territorial limits of the State of New York by and under Subdivision 3 of Section 8 of Article I of the Constitution of the United States, which vests the Congress of the United States with exclusive jurisdiction over and with reference to interstate commerce.

Third. The Court erred in holding that the tax so imposed was or might be regarded as a license fee for the privilege of doing the business of towing on the Hudson river with the means and instrumentalities stated in the first and second assignments of error herein, and that the exaction of such license fee by the State of New York was not the imposition of a burden upon business of an interstate character and so was not an invasion and impairment of the rights, privileges and immunities of the plaintiff in error under said Subdivision 3 of Section 8 of Article I of the Constitution of the United States.

Fourth. The Court erred in so construing Section 184 of Chapter 909 of the Laws of 1896 of the State of New York designated and known as the Tax Law, which in terms excluded from its operation and effect earnings derived from business of an interstate character, as to include the earnings of plaintiff in error from the business of towing boats and barges on one of the navigable waters of the United States with steamers and tugs that were vessels of the United States which were manned and operated by employees licensed to
64 act as such under and pursuant to the laws of the United States and in rejecting the claim and contention of the plaintiff in error that under Subdivision 3 of Section 8 of Article I of the Constitution of the United States such earnings were not included in said Section 184 of the Tax Law of the State of New York and were under such constitutional provision and the laws of the United States relating thereto exempt from taxation by the State of New York or the imposition of any other burden thereon by that State.

The People of the State of New York on the relation of the Cornell Steamboat Company therefore prays that a writ of error from the Supreme Court of the United States may issue to the Supreme

Court of the State of New York; and further prays that the Supreme Court of the United States will reverse the said final order and judgment of the Supreme Court of the State of New York and that the Cornell Steamboat Company, the relator herein, may be restored to all things which it has lost by occasion of the said final order and judgment, and further may have such other and further relief as may be proper and just.

Dated this 13th day of September, A. D. 1912.

AMOS VAN ETTEN,
Attorney for Cornell Steamboat Company,
Plaintiff-in-Error.

65 [Endorsed:] The Supreme Court of the State of New York. The People of the State of New York, ex rel. Cornell Steamboat Company, Plaintiff-in-Error, against William H. Sohmer, as Comptroller of the State of New York, Defendant-in-Error. (Original.) Assignment of Errors. Amos Van Etten, Attorney for Plff. in Error, Kingston, N. Y. Filed Oct. 16, 1912. Clerk's Office, Albany County, N. Y.

66 Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, ex Rel. CORNELL STEAMBOAT COMPANY, Appellant,
vs.
WILLIAM H. SOHMER, as Comptroller of the State of New York, Respondent.

Appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 14, 1911, which confirmed a determination of the defendant denying an application for a revision and readjustment of taxes for the years 1902 and 1903.

Lewis E. Carr and Amos Van Etten for appellant.

Thomas Carmody, Attorney-General (Franklin Kennedy of Counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: Gray, Werner, Hiscock and Collin, JJ.

CULLEN, *Ch. J.:*

I vote for the affirmance of the order appealed from on the strength of the proposition asserted in the dissenting opinion in New York Terminal Company v. Gaus (204 N. Y. 512, 519) that the franchise tax imposed by the statute "is levied on the corporation for the privilege, as the statute declares, of carrying on its business in a corporate or organized capacity; not of doing business, but of doing business in a corporate capacity;" in other words, exclusively for the privilege of being a corporation instead of a partnership. And the additional franchise tax required by section 184 is, in my opinion, exactly of the

same character. I doubt whether in the true sense of the
67 term it is to be considered a tax, but should not rather be deemed a compensation exacted for the privilege which the state might refuse. If the parties beneficially interested in the appellant are dissatisfied with the price exacted by the state they may have the corporation dissolved and as individuals carry on the same business that is being done now without the cost of any such charge.

Concur: Willard Bartlett and Chase, JJ.

68 [Endorsed:] Court of Appeals of the State of New York. The People, ex rel. Cornell Steamboat Company, Appellant, vs. William H. Sohmer, as Comptroller of the State of New York, Respondent. Opinion. Lewis E. Carr, Attorney for Cornell Steamboat Co., No. 56 Pearl St., Albany, N. Y. Filed Oct. 16, 1912. Clerk's Office, Albany County, N. Y.

69 The Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, ex Rel. CORNELL STEAMBOAT COMPANY, Plaintiff in Error,
against
WILLIAM H. SOHMER, as Comptroller of the State of New York, Defendant in Error.

STATE OF NEW YORK,
Albany County Clerk's Office, ss:

To the Supreme Court of the United States:

I, William J. Grattan, clerk of the County of Albany and of the Supreme Court of the State of New York therein, the same being a court of record, do hereby certify that the foregoing are the original writ of error allowed in the above entitled action by the Chief Judge of the Court of Appeals of the State of New York; petition for such writ, bond, order for writ to issue, citation thereon with proof of service, assignment of errors and copy of opinion of the Court of Appeals, with a certified transcript of the record in the above entitled action, which original papers and certified transcript of record were filed in my office with the original writ of error herein, and are hereby returned to the Supreme Court of the United States in obedience to the command of said writ.

In witness whereof, I have hereunto set my hand and af-
70 fixed the seal of my office this 16th day of October, A. D. 1912.

[Seal Albany County, July, 1847.]

WM. J. GRATTAN, *Clerk.*

Endorsed on cover: File No. 23,396. New York Supreme Court. Term No. 365. The People of the State of New York on the Relation of Cornell Steamboat Company, plaintiffs in error, vs. William H. Sohmer, as Comptroller of the State of New York. Filed October 21st, 1912. File No. 23,396.

No. 62

FILED
OCT 3 1914
JAMES D. MAHER
CLERK

UNITED STATES SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK EX REL. CORNELL STEAMBOAT COMPANY,

Plaintiff in Error,

vs.

WILLIAM H. SOHMER AS COMPTROLLER OF THE STATE OF NEW YORK,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. T. NEWCOMB,
Attorney for Plaintiff in Error.

LEWIS E. CARR,
AMOS VAN ETTEN,
Counsel.

UNITED STATES SUPREME COURT.

The People of the State of New York, on the relation of Cornell Steamboat Company,
Plaintiff in Error,

vs.

William H. Sohmer as Comptroller of the State of New York,
Defendant in Error.

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UNITED STATES SUPREME COURT

The People of the State of New York on the relation of Cornell Steamboat Company,
Plaintiff in Error.

vs.

William H. Sohmer, as Comptroller of the State of New York,
Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT.

This case is here on a writ of error to the Supreme Court of the State of New York to review a final judgment of that court entered July 17th, 1912, which confirmed a determination of the Comptroller of the State of New York refusing to revise and readjust the amount of taxes imposed by him on the relator, the plaintiff in error here, for the years 1902 and 1903, under *Section 184 of the Tax Law of the State of New York. Petition for Writ of Error. Record. p. 22; Order allowing Writ of Error. p. 30; Assignment of Errors, pp. 30, 31; Writ of Error. p. 22; Judgment of Supreme Court of the State of New York. pp. 20, 21, 22.*

The judgment of the Supreme Court of the State of New York was rendered in a proceeding instituted by the Cornell Steamboat Company to review by certiorari a determination of the Comptroller of the State of New York denying its application to him for a revision and readjustment of taxes imposed by such Comptroller upon that Company for the years 1902 and 1903 under *Section* 184 *of the Tax Law of the State of New York. Statement, Record, p.* 1; *Petition for Writ of Certiorari, pp.* 2, 3, 4, 5, 6; *Order for Writ, p.* 7; *Writ of Certiorari, pp.* 9, 10.

In the years 1902 and 1903, the Comptroller of the State of New York imposed upon the plaintiff in error taxes on its earning in those years and denied its application for a revision and readjustment of such taxes. They were assessed and imposed by him under *Section* 184 *of the Tax Law of the State of New York* which will hereafter be quoted. His determination and decision denying the application was made September 19th, 1904, *pp.* 5, 6. The tax for 1902 was alone mentioned in that determination but under the consolidation of the tax of 1903 with that of 1902 in the hearing before and by the Comptroller, hereafter mentioned, the tax of 1903 was in fact included in the hearing and determination.

On the earnings of the plaintiff in error appearing in its report for the year ending June 30, 1902, the Comptroller assessed and imposed a tax against it of $1,885.73, which, after deducting a rebate of $942.86, the plaintiff in error paid. Such rebate was of an amount credited as due to it on prior readjustments of its taxes and in no way affects the question presented by the writ of error herein. *Record, p.* 3.

November 14, 1902, the plaintiff in error applied to the Comptroller for a rehearing and readjustment of

the tax so assessed and imposed under *Section* 198 *of the Tax Law of the State of New York*, which authorized an application for such a purpose. A hearing on that application was had February 17, 1903. *Record, p.* 4. Before a determination by the Comptroller therein the report of the plaintiff in error for the year ending June 30th was filed, with an affidavit of its Vice-President, verified September 26, 1903, stating the origin of the earnings included in that report was the same as that stated in the hearing February 17, 1903, as to the earnings included in the report for the year ending June 30th, 1902. *Record, pp.* 3, 4, 15.

Upon the earnings appearing in the 1903 report the Comptroller assessed and imposed a tax which, after deducting a rebate previously allowed, in no way affecting the question presented by the writ of error herein, amounted to $986.26, which the plaintiff in error subsequently paid. *Record, p.* 4. In September, 1903, the tax so assessed and imposed for 1903 was included in the hearing on the application for revision and readjustment then pending relative to the tax for 1902. *Record, pp.* 5, 11; *Admission in return to the Writ of Certiorari.*

September 19th, 1914, the Comptroller denied the application for revision and readjustment of the tax so assessed and imposed on the plaintiff in error, holding the assessment complained of did not include taxes which could not have been legally demanded. *Record, pp.* 5, 6. While the formal order of the Comptroller there appearing referred only to the tax of 1902, under the agreement in September, 1903, previously stated, that the tax of 1903 should be included in the hearing and determination of the matter then pending, the decision and determination of the Comptroller in fact applied to and covered the tax for both 1902 and 1903.

October 15th, 1904, a writ of certiorari was issued from the Supreme Court of the State of New York on the petition of the plaintiff in error to review and correct the determination of the Comptroller as to such taxes and such writ was duly served on the then Comptroller. *Notice of Motion for Writ, Record, p. 2; Petition for Writ, pp. 2, 3, 4, 5, 6; Order for Writ to issue, p. 7; Writ of Certiorari, pp. 9, 10, 11.*

November 17, 1904, the Comptroller made and filed a return to such writ. *Record, pp. 11, 12.* A supplemental return was made and filed November 30, 1909. *Record, p. 17.* The matter presented by such writ and return thereto was heard by the Appellate Division of the Supreme Court of the State of New York of the Third Judicial Department. That court, November 14, 1911, rendered a decision confirming the determination of the Comptroller. *Record, pp. 18, 19.* The relator therein thereupon appealed from the order of the Appellate Division to the Court of Appeals of the State of New York. *Record, p. 19.* June 22, 1912, that court, by its order then made, affirmed the order so appealed from and remitted the case to the Supreme Court for action thereon in acordance with such order. *Record, pp. 20, 21.* July 17, 1912, the order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York by an order then made. *Record, pp. 21, 22.*

The plaintiff in error thereupon applied for and obtained a writ of error from this court to review such judgment. Such writ of error was granted by the Chief Judge of the Court of Appeals October 2nd, 1912. *Record, pp. 22, 23, Writ of Error; pp. 24, 25, 26, Petition for Writ; p. 27, Citation; pp. 28, 29, Bond; p. 30, Order for Writ; pp. 30, 31, 32, Assignment of Errors.*

The question presented is as to the right of the State

of New York under *Section* 184 *of its Tax Law* to impose a tax upon the earnings of the Cornell Steamboat Company, the plaintiff in error herein, exclusively derived from towing vessels on the Hudson River and in and about New York harbor, which are navigable waters of the United States, such business having been done under and in conformity with the laws of the United States. *Assignment of Errors, Record, pp.* 30, 31.

The contention of the plaintiff in error before the Comptroller and in the Supreme Court and Court of Appeals of the State of New York was and is here, such earnings were to be deemed and regarded as from business that was interstate in character, in that it was conducted under and in conformity with the supervision, dominion and control of the United States and not under the supervision and control of the State of New York and they were not subject to the tax law of that State.

STATEMENT OF FACTS.

The Cornell Steamboat Company, the plaintiff in error, is a corporation organized March 29, 1878, under and pursuant to the New York law for the formation of corporations, passed February 17, 1848, as the same had been amended prior to the time of its organization. The object for which it was incorporated was

> "for the purpose of constructing, owning and using vessels to be employed for hire in towing vessels * * * on any of the navigable rivers and lakes in or bordering upon the State of New York or on the high seas or in the various arms of the seas and rivers running into the same."

In its articles of association the principal office of the corporation was stated to be in the city of New York, but that was subsequently changed to the city of Kingston, Ulster County, N. Y. *Record, p.* 2, *Allegation in petition for writ of Certiorari. Record, p.* 11, *Admission in Return.* The taxes imposed upon it by the Comptroller for the years 1902 and 1903, which are here the subject of consideration, were so imposed by him under the provisions of *Section* 184 *of Chapter* 908 *of the Laws of the State of New York of* 1896, *which was the revised and consolidated Tax Law of that year.*

The earnings upon which such taxes were imposed were those exclusively derived from towing boats, barges and vessels on navigable waters of the United States. The tows were made up in the Hudson River at Albany, N. Y., or its vicinity, or in the bay about New York City or its vicinity, and the Steamboat Company, the plaintiff in error, thereupon attached a towing line connecting the tows with its tugs or steamers and moved the tows down or up the river, leaving the tows up-bound in the river at Albany or its immediate vicinity and those bound down the river in the bay at New York City or in the waters adjacent thereto. *Record, pp.* 3, 4, 12, 13, 15, 17.

The service of the company for which it was paid and which produced the earnings upon which the taxes were imposed was wholly disconnected from the shore, it had nothing to do with making up the tows but took them in the river or bay as made up and towed them with its vessels to their destination in the river or bay. The vessels with which the towing was done were all licensed under and pursuant to the laws of the United States and the men employed thereon were licensed under and pursuant to the same laws. *Record, p.* 13. There is and can be no controversy as to the facts. The question

presented is purely one of law and relates to and involves the right and power of the State of New York to impose a tax upon the earnings thus derived.

STATEMENT OF ERRORS, IN THE JUDGMENT BROUGHT UP FOR REVIEW.

1.—The Supreme Court of the State of New York erred in rejecting the claim of the plaintiff in error that the earnings upon which the taxes were imposed were not included in the exemption contained in *Section* 184 *of the Tax Law*, which excepted from the operation of that section "earnings derived from business of an interstate character."

2.—Such court erred in rejecting the claim of the plaintiff in error that the earnings upon which the taxes were imposed could not, under *Subdivision* 3 *of Section* 8 *of Article* 1 *of the Constitution of the United States*, be subjected to a tax imposed by the State of New York.

3.—Such court erred in upholding the claim of the defendant in error that the taxes imposed on the earnings of the plaintiff in error, derived from its towing business on the navigable waters of the United States, with vessels of the United States, which were manned by employees licensed by the United States, were such taxes as the State of New York could lawfully exact and demand.

ARGUMENT.

FIRST.

The question presented in this case is not as to the right of the State of New York to impose a tax upon a corporation organized under its laws for its privilege of doing business in a corporate capacity but is as to the right of that State to impose a tax on such a corporation for the privilege of doing a class of business that is outside of its dominion and control. It relates to the character of the business from which the earnings were derived and not to the corporate character of the one by whom the business is done.

1.—Taxes are imposed by other sections of the Tax Law of the State of New York which relate to the organization of corporations and the exercise of their franchises, that is their right to do business as corporations.

(a) *Section* 180 of the Tax Law of the State of New York, in effect at the time the taxes in question were imposed, provided for an organization tax of one-twentieth of one per cent. on its capital stock for the privilege of organizing the corporation, to be paid upon the incorporation of the company.

(b) *Section* 182 of the same law provided for a franchise tax to be paid annually by all domestic corpora-

tions for the privilege of doing business or exercising their corporate franchises in the State of New York. Such tax was based upon the dividends declared and paid on their capital stock, or, in cases where no dividends were declared and paid, upon an appraised value of the capital stock, to be made as provided for in that section. This tax was and is for the right or privilege of being a corporation, that is, of doing business in a corporate capacity. *Home Ins. Co. vs. New York*, 134 U. S. 594, 599, 600. The taxes imposed by these sections are not questioned. It is proper, however, to refer to them to make it clear that the corporation, plaintiff in error in this case, is not seeking to avoid the payment of taxes imposed upon it for its privilege of doing business as a corporation.

2.—The tax, the validity of which is here challenged, was imposed under *Section* 184 *of the Tax Law*, previously referred to, which, so far as seems to be necessary to be quoted, is as follows:

> "*Section* 184. Additional franchise tax on transportation and transmission corporations and associations.—Every corporation * * * formed for * * * navigation * * * purposes * * * shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character."

We are now to see if under the section quoted the State of New York has the right to impose upon the

plaintiff in error a tax based upon its earnings derived from its business done exclusively, so far as dominion of the place of its doing and the means and instrumentalities with which it is done are concerned, in the domain and under the regulation and control of the government of the United States.

3.—The right of the State of New York to impose a tax on earnings of the character of those here the subject of consideration does not depend upon what the tax is called in the section of the Tax Law under which the right to impose the tax is asserted, but on the character of the earnings which are made the basis of the tax and that necessarily involves consideration of the place where, and the instrumentalities and means by which, the business is done which produced such earnings. Calling it an additional franchise tax does not give to the State of New York any greater right to impose it than it would have if it was called a license fee for doing the business or by some other name or designation. However called or designated, it is a tax based on earnings and the right to tax such earnings must be found to uphold it. This section recognizes and deals with two classes of earnings, those derived from business of an interstate character and those derived from business of an intrastate character. The former is excluded from the exercise of the power to tax, leaving the latter alone subject to the tax provided for in the section. It will also be observed this section of the Tax Law clearly recognizes the fact that earnings may be derived from business of an interstate character although it originates and terminates within the State of New York. The tax is imposed:

> "Upon its gross earnings from its transportation or transmission business originating and terminating within this State, but shall not include earnings from business of an interstate character."

The tax can only be imposed upon earnings derived from business originating and terminating within the State of New York. It is not, however, upon all earnings derived from business done that originates and terminates within the territorial limits of the State of New York that the tax can be imposed for such business included therein as is of an interstate character is in terms excluded. It is therefore clear the fact that the business originated and terminated within the territorial limits of the State of New York is not controlling. Business so originating and terminating may be of an interstate character. That depends upon the place where the business from which the earnings are derived is conducted and the dominion and control of that place, and of the means, instrumentalities and facilities with which it is conducted. If the place was one subject to the dominion and control of the State of New York and the means and instrumentalities and facilities with which the business was done were subject to the regulation of that State it would be intrastate, but if such dominion, regulation and control did not apply it could not be such business and would necessarily be interstate in its character.

SECOND.

The earnings of the plaintiff in error which were the basis of the tax here the subject of consideration were of an interstate character because they were derived from towing business done on navigable waters of the United States where its dominion and control were supreme and under the navigation laws of the United States, adopted in the exercise of such dominion and control of the place and of the business done thereon. They were, therefore, not such earnings as were embraced within the right of the State to tax under Section 184 of the Tax Law.

1.—The place where the business was done from which the earnings in question were derived was the Hudson River and New York harbor. The character of the business was the movement of tows from Albany to and about New York harbor and from such harbor to Albany. The tide ebbs and flows in the Hudson River from a point above the place where the towing business of the relator had its origin to the place where it terminated. The whole water in and upon which this business of the relator was done was and is tidal in its character. It was, therefore, navigable water at common law. *Hardin vs. Jordan*, 140 U. S. 371, 381, 382, 383. In such streams and waters, whatever may be the right of the State as to the land under water, the right of the United States to regulate commerce thereon is paramount. With us the navigability of a stream or

water does not depend on its tidal character. This court holds that a stream or body of water which is navigable in fact is navigable water of the United States when it forms by itself or by its connection with other waters a continuous highway over which commerce is or may be carried on with other states or foreign countries in the customary way in which such commerce is conducted by water.

The Daniel Ball, 10 Wallace, 557, 563. It was there said:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

That was said with reference to Grand River in the State of Michigan and a steamboat navigating that river within the territorial limits of that State. It was followed in *The Montello*, 20 Wallace, 430, 439, 443, which related to the Fox River in the State of Wisconsin and a vessel navigating that river within the limits of that State. See also *Ex parte Boyer*, 109 U. S. 629, 631, 632, where the *Ball Case* was cited and the principle stated in it was applied to a steam canal boat mov-

ing on the Illinois and Michigan Canal, an artificial waterway, between points in the State of Illinois.

Norfolk, etc., R. R. Co. vs. Pennsylvania, 136 U. S. 114, 119. There it was applied to a railroad that was a link in a through line of railroad over which interstate business in a measure passed. The Norfolk and Western Railroad Company was a Virginia corporation and its road and branches were all within the limits of that State. Its main office was at Roanoke, Va., but it had an office in the State of Pennsylvania. The question that arose was as to its liability to a license tax or fee exacted by the State of Pennsylvania for doing business in that State. It was held it could not be required to pay the tax demanded and in so holding the *Ball Case* was cited and followed.

The Minnesota Rate Cases, 230 U. S. 352, 399; *The Robert W. Parsons*, 191 U. S. 17, 26, 35. There the principle was applied to the Erie Canal and boats navigating that canal. In whatever form the question has arisen it has at all times been held that waters such as are indicated in the above quotation were navigable waters of the United States. Within this rule the Hudson River and the waters of New York harbor and vicinity are navigable waters of the United States. The place, therefore, where the business was done from which the earnings of the plaintiff in error, here the subject of consideration, were derived was territory over which the United States, and not the State of New York, as to that business had and exercised dominion. *Minnesota Rate Cases*, 230 U. S. 399. That such dominion exists and has been and is exercised by the government of the United States appears from the fact that light houses to serve as aids to navigation are maintained by that government and buoys to provide for and secure safety in the navigation of those waters are located and main-

tained by the same governmental authority. Shipping and navigation laws regulating and governing such navigation are adopted and enforced by and under acts of the Congress of the United States, and moneys from time to time required for the deepening and improvement of the channel are appropriated by the United States and paid from its treasury. So in all respects relating to such waters, the navigation thereof and the movement of commerce thereover, the United States, and not the State of New York, controls. It is also the fact that by that river and the bay at its junction with the sea commerce does *or may* in its customary way move to other States and enter the channels of commerce with foreign nations. To such river and bay the decisions of this court cited above directly and precisely apply.

2.—The means and instrumentalities used in conducting the business from which the earnings in question were derived were and are subject to the same control, that is, the control of the United States, and not of the State of New York.

(a) The vessels used for the towing that produced the earnings were enrolled and licensed under and in accordance with the statutes and regulations of the United States. *Record, p.* 13. Such vessels are deemed vessels of the United States. *Section* 4131, *U. S. Rev. Stat.*, 7 Federal Statutes Annotated, *p.* 10, provides:

> "Vessels registered pursuant to law and no others, except such as shall be duly qualified according to law for carrying on the coasting or fishing trade, shall be deemed vessels of the United States."

Section 4311, *U. S. Rev. Stat.*, 7 Federal Statutes Annotated, *p.* 56, provides:

> "Vessels of twenty tons and upwards, enrolled in pursuance of this title, and having a license in

> force, or vessels of less than twenty tons, which, although not enrolled have a license in force, as required by this title, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries."

The term "*coasting trade*" mentioned in those sections and in other sections of the Federal statutes relating to shipping and navigation means commercial intercourse carried on between different districts in different States, different districts in the same State and between different places in the same district on the sea coast or on a navigable river. *Ravesies vs. United States*, 37 Federal Reporter, 447. *North River Steamboat Company vs. Livingston*, 3 Cowen, 713, 747, 748. There the court said:

> "According to the definition of the coasting trade, as extracted from the Act of Congress of February 18, 1793, it means commercial intercourse carried on between different districts in different States, between different districts in the same State, and between different places in the same district, on the sea coast or on a navigable river. Agreeably to this definition, a voyage in a vessel of suitable tonnage, from New York to Albany, is as much a coasting voyage as from Boston to Plymouth or New Bedford. In both, the termini are in the same State and within the navigable waters of the United States, though in one the navigation is upon a river, in the other on the ocean. * * * In corroboration of this construction is the fact that all vessels employed in navigating the river take a coasting license. I am aware it is said that the license is given, not under the power to regulate commerce, but the power to levy and collect taxes. When Congress have power to do the same act by virtue of distinct powers they may exercise which

> they please; and when they profess to act under the power to regulate commerce, as they do in this act, there is no necessity to resort to any other."

What was there said was in accordance with the decision of the United States Supreme Court in *Gibbons vs. Ogden,* 9 Wheaton, 1, 189, 190, 195, 196, 215, 216; *Sinnot vs. Davenport,* 22 Howard, 227, 240, 241, 242.

Under these decisions and statutes it is plain the steamboats with which the relator towed boats as previously stated were vessels of the United States engaged in the coasting trade.

(b) The engineers and pilots employed on such boats were licensed under the statutes of the United States. *Section* 4131, *U. S. Rev. Stat.*, 5 Federal Statutes Annotated, *p.* 395, provides:

> "All the officers of vessels of the United States shall be citizens of the United States, except that in cases where on a foreign voyage, or on a voyage from an Atlantic to a Pacific port of the United States."

Section 2 *of the Act of* 1896, *amending section* 4131, provides for the term of the license to be granted to such officers, their renewal and suspension and other matters connected with them. *Section* 4401, 5 Federal Statutes Annotated, *p.* 397, provides that all coastwise seagoing vessels shall be subject to the navigation laws of the United States when navigating within the jurisdiction thereof and all vessels propelled in whole or in part by steam, navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing as provided by this title; and every coastwise seagoing steam vessel

subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. *Sections* 4438, 4439, 4440, 4441, 4442 and 4443 provide for the licenses to the different officers named in them. So the persons who operated the boats of the plaintiff in error from the use and service of which the earnings in question were derived were licensed to act in their respective capacities by the United States, and not by the State of New York.

(c) The rules and regulations for their navigation were those established by the United States. *Sections* 4400, 4401, *U. S. Rev. Stat.*, 7 Federal Statutes Annotated, *pp.* 161, 162. So the means and instrumentalities with which the business was done were those furnished and provided under and in conformity with the laws and regulations of the United States. The State of New York did not provide the place for doing the business; it did not license the boats or men with which it was done; nor did it prescribe the regulations in any respect under which the business was done. The privilege of doing this business was derived from the United States and not from the State of New York.

3.—It is entirely plain the section of the Tax Law under which the taxes in question were imposed (*section* 184) recognizes two classes of business in that originating and terminating in the State of New York; that of an intrastate character and that of an interstate character. Earnings from the former might be the subject of a tax imposed by the State of New York under this section, those derived from the latter could not, for earnings from business of that character are expressly ex-

cluded. The fact that the business originates and terminates within the territorial limits of the State of New York does not control, for the entire earnings referred to are from business of that character. As the legislature excluded from the earnings generally derived from business originating and terminating within the State of New York business of an interstate character it must be assumed it recognized and intended to recognize the fact that business of an interstate character might be done which originated and terminated within that State. So the place of its beginning and ending does not control. Nor does the fact that the business originating and terminating in the State of New York in some part of its journey passes into and through a bordering State make it interstate in its character. *Lehigh Valley Railroad vs. Pennsylvania*, 145 U. S. 192, 201, 202. The question was directly raised in that case under a Pennsylvania taxing statute and it was held in accordance with the foregoing statement. The excluding part of *Section* 184 cannot be rejected, but must be given meaning and effect. To what, then, does it apply? Manifestly to the business previously referred to done upon the navigable waters of the United States under the control and regulation of the United States, and with the means and instrumentalities that government authorizes to be used for the purpose of navigating and conducting business on such waters. Such business is of an interstate character, within the territorial limits of the State of New York, for it is authorized and regulated by the United States, and not the State. That government can regulate no other commerce than that of an interstate character, hence the business in question was of that character and so excluded from the power of the State of New York to tax. The distinction between navigable waters, such as are mentioned in this case as highways

for the movement of commerce, and railroads, canals and turnpikes is very plain. The latter are creations of States and are not highways open to the use of all. The former constitute natural highways, open to all who choose to navigate so long as they comply with the regulations of the sovereign of such highways, which sovereign is the government of the United States. This construction and application of *Section* 184 of the Tax Law is in conformity with its terms and gives full force and effect to the supremacy and control of the government of the United States in its regulation and control of the business done on its waters. They are like the sea with which they connect, open to the commerce of foreign nations equally with that of our own nation or that of the several States making up and constituting the United States.

4.—Business of the character of that conducted by the plaintiff in error, which produced the earnings upon which the taxes here the subject of discussion were imposed, is not subject to the dominion and control of the State of New York, and therefore cannot be made the subject of a tax imposed by it. It would seem to be plain that must be so from what has already been said with reference to the dominion of the place where the business was done and of the means and instrumentalities with which it was done. This statement does not rest on mere assertion, but is supported by an unbroken series of judicial decisions. In the case of *The Daniel Ball*, 10 Wallace, 557, previously cited, the question presented was as to the character of the steamer *The Daniel Ball*, that navigated the Grand River, between Grand Rapids and Grand Haven, both places in the State of Michigan, and its being subject to the navigation laws and regulations of the United States. The

Grand River was not a tidal stream, but it did connect with other navigable waters over which, with it, commerce might be conducted between States. In that case it was said by this court, *p.* 563:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of travel on water, *and they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.*"

Again, *page* 564, quoting from *Gilman vs. Philadelphia*, 3 Wallace, 724, the court said, speaking of the power of Congress as to such waters:

> "*The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress.*"

Again, *page* 565, speaking of the steamer in question, that ran exclusively in the State of Michigan, the court said:

> "She was employed as an instrument of that commerce; for whenever a commodity has begun to

> move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transaction."

It was held the steamer was subject to the navigation laws and regulations of the United States. What was there said and decided applies to this case. Here the commodities transported were loaded into boats and the loaded boats were towed by the plaintiff in error on tidal waters where the dominion of the United States is, as to navigation, supreme. *The earnings received were for commerce so conducted subject to the regulations and laws of the United States.*

In *Philadelphia Steamship Co. vs. Pennsylvania*, 122 U. S. 326, the question was as to the validity of a State statute imposing a tax on the gross earnings of a steamship company incorporated under the laws of that State where its business was the transportation of persons and property on the sea. It was held the tax could not be upheld. At *page* 336 this appears in the opinion of the court:

> *"Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress."*

The court there held the State could not tax the receipts from the business any more than it could in any

other way regulate it. *Pages* 336, 338, 342, 345. *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S. 196, is to the same effect. In that case a State tax was imposed upon a ferry company operating on the Delaware River between Philadelphia and Camden. The tax so imposed was in effect upon the business of the company. It was held it was illegal and could not be imposed. In *Harmon vs. Chicago,* 147 U. S. 396, the question for decision was the validity of an ordinance of the city of Chicago, imposing a license tax on vessels for the privilege of navigating the Chicago River and its branches by steam tugs licensed by the United States under *Section* 4321 of the U. S. Rev. Stat., and it was held it was invalid. See *pages* 404, 405, 408. On *page* 405 the following, quoted from *Gibbons vs. Ogden,* 9 Wheaton, 1, 213, is of value here in pointing out the nature of the privilege granted under the statutes of the United States:

> "These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ship or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act."

Again, *page* 408:

> "In the light of these decisions, and many others to the same effect might be cited, there can be no question as to the invalidity of the ordinance under consideration, unless its validity can be found in the alleged expenditures of the city of Chicago in deepening and improving the river. It is upon

such alleged ground that the court below sustained the judgment and upheld the validity of the ordinance, and it is upon that ground that it is sought to support the judgment in this court."

That ground was held untenable and the ordinance of the city was declared invalid. It will be observed the place to which the ordinance in that case applied was not tidal water, but water navigable in fact. The tugs there used did not and could not, in the course of their ordinary business, come to the sea. The city had expended large sums of money in deepening and improving the harbor and channel of the river at Chicago. What was imposed by the ordinance was the payment of a license fee or tax for the tugs so using this water way. The form of the exaction is not material. If the requirement of the ordinance had been to pay a tax upon the earnings of the tugs so used, for the privilege of navigating the river and harbor and towing vessels therein, it would not have been any nearer validity than the license fee in fact prescribed by the ordinance. The tugs having been licensed by the United States had the privilege of unobstructed navigation upon the navigable waters of the United States. A tax or license fee, however measured, which is imposed upon or exacted from the prosecutors of the business done, or for the vessels used in doing the business, would be an obstruction to the free navigation authorized by the license from the United States and therefore beyond the power of a State or a municipality therein to exact and enforce. *Sinnot vs. Davenport*, 22 Howard, 227, 241, 242. When the principle of that case is applied to the one in hand it seems plain the decision in the former must govern the latter. The tugs and steamers of the plaintiff in error are licensed by the United States and under and by

virtue of such licenses they are entitled to free and unobstructed navigation of the Hudson River and New York harbor in the towing of vessels thereon and thereover. If the State of New York undertook to exact a license fee for each tug or steamer used for the privilege of towing vessels on such waters the case would be the same as the *Harmon Case, supra*. The power and right of the State of New York to exact any payment for the privilege of using such vessels on such waters must be governed by the same rule, whatever may be the form of the exaction. The section of the New York Tax Law under consideration imposes an excise tax or license fee equal to five-tenths of one per centum on gross earnings. It is plainly a license fee measured by gross earnings. It is a license fee for the privilege of using tugs and steamers for towing vessels on navigable waters of the United States, a privilege they already have under licenses from the United States.

Calling it a tax equal to a per cent. of gross earnings is in reality a tax upon such earnings. *Galveston, etc., R. R. Co. vs. Texas*, 210 U. S. 217, 227. There this court said:

> "The distinction between a tax equal to one per cent. of gross receipts and a tax of one per cent. of the same seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain interference from the statute taken by itself. * * * This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words equal to."

In that case the distinction between *Maine vs. Grand Trunk Ry. Co.*, 142 U. S. 217, and *Philadelphia, etc.*,

Co. vs. Pennsylvania, 122 U. S. 326, was pointed out. In the former case the tax was to be regarded as a property tax as it was in lieu of all other taxes, while in the latter it was purely a tax on earnings. The tax in the former case was upheld but in the latter it was declared invalid. In this case there is nothing in the nature of a property tax and therefore it is an attempt to tax earnings for a privilege in fact obtained from a superior authority, the United States.

Western Union Telegraph Co. vs. Kansas, 216 U. S. 1, 19, 20, 21; *The Belfast*, 7 Wallace, 624, 640. There the court said:

> "Navigable rivers, which empty into the sea, or into the bays and gulfs which form a part of the sea, are but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself."

In *Lord vs. Steamship Co.*, 102 U. S. 541, the question was as to the applicability of the United States statutes to a steamer running between ports in the State of California, navigating the sea adjacent to the coast of California in so doing. It was held to be exclusively within the statutes of the United States, although the commodities it carried were taken on at one port in California and put off at another port of the same State. *Page* 542. At *page* 545 the court said:

> "The commerce regulated is expressly confined to a kind over which Congress has been given control. * * * The contracts sued on do not relate to the purely internal commerce of a State, but impliedly, at least, connect themselves with the commerce of the world, because in their performance the laws of nations on the high seas may be involved, and the United States compelled to respond."

In *St. Louis vs. Consolidated Coal Co.*, 158 Mo. 342, it was held a license fee exacted by the city from licensed vessels of the United States for the privilege of doing the business of towing vessels out of, or about, the harbor of St. Louis could not be recovered, because the city had no power to exact such a license fee from vessels of that character. In *People ex rel. Pennsylvania R. R. Co. vs. Knight*, 171 N. Y. 354, the following, quoted from *p.* 361, is of value here:

> "The navigable waters of the United States, even when they lie exclusively within the limits of a State, are open to all the world, except so far as Congress may prescribe to the contrary, and it requires no leave or license from a State (except compliance with its police regulations and possibly payment of tolls to defray the costs of the improvement of navigation), for a vessel to journey on its waters. Not so on the land. No one can construct and operate a turnpike or railroad within a State unless by grant from the State or by the authority of Congress, under its constitutional power to establish post roads."

Here the place was the Hudson River within the range of the ebb and flow of the tide and New York harbor, which constitutes the entrance of that river into the sea. The cost of improving the channel by the removal of obstructions and deepening it has been borne and paid by the United States, hence nothing in the way of tolls on the business of the relator based on that ground could be exacted. Nor is there anything else done or omitted by the State of New York that can be made the basis of a tax upon the business so done by the relator on this common highway open to the vessels of all alike.

5.—The following propositions, it would seem, are clearly and fully established by the cases to which attention has been called:

(a) The place where the business of the plaintiff in error was done, from which the earnings in question were derived, was navigable water of the United States, an arm of the sea.

(b) The business there done which produced such earnings was with means and instrumentalities that were exclusively under the dominion and control of the United States. No license, privilege or permission granted by the State of New York entered into it.

(c) The State of New York cannot tax a business so done or impose upon it a burden, either by way of tax or license fee, or other exaction. A tax on earnings or measured by earnings comes within this prohibition. These propositions should be decisive of this case, and require a reversal of the judgment of the Supreme Court of the State of New York with a direction that the taxes imposed on the plaintiff in error for the years 1902 and 1903 be cancelled.

6.—The right of a State to impose a tax is based upon the protection or opportunity it affords or the privilege it grants to the one who is subjected to the tax. Here protection and opportunity are afforded and privilege is granted to the plaintiff in error as to the towing business it conducts and has conducted, by the United States, not by the State of New York in any respect. For its organization as a corporation and its privilege to do business in that capacity the State of New York imposes taxes which are not challenged. What by way of oppor-

tunity, privilege or license does the plaintiff in error receive from the State of New York in connection with its towing business? Manifestly nothing. It does not license its steamers and tugs, it does not license its men employed thereon, it does not regulate the movements of the steamers and tugs employed, and it does not in any sense of the word provide the place where the towing is done and its earnings are made. All of these things are provided and conferred by the government of the United States. So the entire basis for a tax or license fee fails as to the State of New York, and nothing remains which justifies or sustains any exaction by that State out of or based upon earnings so exclusively derived, whatever the exaction may be called. The underlying principle which forbids the exaction of a tax or license fee by the State for, upon or in connection with traffic conducted as previously stated is, that a State may not in any way burden the thing or things within the jurisdiction and power of the United States to authorize, license and control which that government has in fact authorized and licensed, for if that were permitted the State might impose such burdens thereon the authority, right and power of the United States would cease to exist. In *McCullough vs. Maryland*, 4 Wheaton, 316, 436, this court said:

> "The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy, which the constitution has declared."

See also *Home Ins. Co. vs. New York*, 134 U. S. 594, 598, 599; *Harmon vs. Chicago*, 147 U. S. 396, 405, 406, 407; *Gibbons vs. Ogden*, 9 Wheaton, 1, 213.

The exaction by the State of New York in this case cannot be distinguished in principle from the burdens that in the cases cited were of such character it was held by this court they could not be imposed by a State.

7.—So far the discussion has been based upon the fact that the business from which the earnings were derived was done in territory that, as to such business, was to all intents and purposes that of the United States and with vessels and men licensed under and in accordance with the laws of the United States, and the contention has been such earnings could not be subjected to a tax by the State of New York, whether the business from which they were derived was held to be within the exception contained in *Section* 184 or was not so held.

In either view the judgment of the Supreme Court of the State of New York was erroneous in upholding the taxes imposed on or for such earnings.

In addition to what has so far been said is the fact that in reality the business done involved in some respect and to some extent movement of the tugs and steamers and the tows moved by them within the territorial limits of the States of New York and New Jersey. The tows were made up at stake boats at Weehawken in the territorial limits of the State of New Jersey, where the tugs or steamers of the plaintiff in error were attached to them. Their course up the river was to some extent within the limits of both States, New York and New Jersey. The same statement applies to tows that were taken down the river. *Record, p.* 15. The center of the river from the north line of the State of New Jersey to and through New York bay is the boundary line between the States of New Jersey and New York.. *State Law (N. Y.), Section 7, New Jersey boundary line*, Vol. 5, Consolidated Laws of New York, p. 5570.

The agreement which became effective February 5th, 1834, as to jurisdiction over the waters of New York harbor, did not affect or change the boundary line between the States of New York and New Jersey. *Article First, Agreement of* 1833; 5 Consolidated Laws of New York, p. 5571. To some extent, therefore, the movement of tows was in the two States. To what extent it was so is not at all material. *Gibbons vs. Ogden,* 9 Wheaton, 214. How much of the traffic carried in the boats, barges and other vessels towed was in fact moving from one State to another or to or from steamers engaged in foreign trade the plaintiff in error had and has no means of knowing and establishing as its employment was to move such boats, barges and vessels, either loaded or empty. The transaction of this business did not call for inquiry as to the place or places the commodities with which such boats, barges and vessels were loaded originally came from or to which they were destined, or as to the ultimate destination of those that were empty for the purpose of reloading. Its license to run and operate its tugs and steamers was in no way limited by the origin or destination of the traffic it moved. It is, however, a matter of common knowledge that a large part of the traffic moved in this way is interstate in its character. This provision of the Tax Law of the State of New York is a taxing statute and is to be construed in favor of the one sought to be taxed rather than in favor of the State. *People ex rel. Mutual Trust Co. vs. Miller,* 177 N. Y. 51, 57; *People ex rel. Fifth Ave. Building Co. vs. Williams,* 198 N. Y. 238, 247. Where some part of the earnings are derived from business of an interstate character and they cannot be separated from those derived from exclusively State traffic, no tax can be imposed under *Section* 184 of the Tax Law, the one under consideration here. *People ex rel. N. Y. C., etc., Co. vs. Morgan,* 57 App. Div. (N. Y.) 302, 304;

affirmed 168 N. Y. 1, 5. In the *Norfolk, etc., R. R. Co. Case*, 136 U. S. 114, it was held that a railroad entirely within the limits of a State that constituted a link in lines over which through traffic might be and was moved was to be deemed an interstate road. What was there decided was in effect followed in the application of the United States Safety Appliance Act in *Southern Ry. Co. vs. United States*, 222 U. S. 20, 27. Here the place where the business from which the earnings in question were derived was done was an arm of the sea which must be deemed and regarded as an interstate highway, as, in its ordinary use, trade and travel over it may and does enter into the channels of trade and travel from one State to another and from a State to foreign countries. In view of the matters to which attention has been called, within the rules previously stated, it seems clear no tax should have been exacted from the plaintiff in error based upon its earnings for the years 1902 and 1903 and the judgment of the Supreme Court of the State of New York upholding and confirming such tax was erroneous and should be reversed.

It is therefore respectfully submitted the judgment of the Supreme Court of the State of New York brought up by the writ of error herein should be reversed with directions for the cancellation of the taxes imposed upon it for the years 1902 and 1903.

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Office Supreme Court, U. S.
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Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK EX REL. CORNELL STEAMBOAT COMPANY,
Plaintiff in error,

vs.

WILLIAM SOHMER, as Comptroller of the State of New York,
Defendant in error.

October Term, 1913.
No. 365.
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BRIEF OF DEFENDANT IN ERROR

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Capitol,
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SUPREME COURT OF THE UNITED STATES.

People of the State of New York on the Relation of the Cornell Steamboat Company,
Plaintiff in Error,
against
William Sohmer, as Comptroller of the State of New York,
Defendant in Error.

October Term, 1913, No. 365.

BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK ON BEHALF OF THE DEFENDANT IN ERROR.

CONCISE STATEMENT OF THE CASE.

This proceeding is here on a writ of error to the Supreme Court of the State of New York, to review a final judgment of that court entered July 17, 1912, which confirmed a determination of the Comptroller of the State of New York refusing to revise and readjust the amount of corporate franchise taxes imposed by him on the relator, the plaintiff in error, for the years 1902 and 1903,

under section 184 of the Tax Law of the State of New York. (Petition for writ of error, record, p. 22; order allowing writ of error, p. 30; assignment of errors, pp. 30, 31; judgment of the Supreme Court of the State of New York, pp. 21, 22.)

The judgment of the Supreme Court of the State of New York was rendered in a proceeding instituted by the Cornell Steamboat Company, the plaintiff in error, to review by certiorari a determination of the Comptroller of the State of New York, denying its application to him for a revision and readjustment of corporate franchise taxes imposed by said Comptroller upon the company for the years 1902 and 1903 under section 184 of the Tax Law of the State of New York. (Statement, record, p. 1; petition for writ of certiorari, pp. 2, 3, 4, 5, 6; order for writ, p. 7; writ of certiorari, pp. 9, 10.)

The relator is a domestic corporation, organized in 1878 pursuant to the corporation act of 1848 (p. 2 of record). It is a transportation company, carrying on a business of towing canal boats, barges and other vessels on the Hudson river, New York bay and adjacent waters (pp. 2, 3, 13). Its offices are located at Rondout and the city of Kingston. It owns its offices and also shops in Rondout. It rents part of its office building and such rent is part of its gross receipts. At its shops in Rondout are laid up its tugs and barges, when necessary, and there they are repaired (p. 14).

In accordance with the provisions of the Tax Law, in 1902 relator reported its gross earnings *for the year ending June* 30, 1902, to the Comptroller as follows:

> "Gross earnings *not interstate business* derived from all sources during the above period, $377,146.33."

In such report it also stated its "*taxable* gross receipts" as such sum. This report was sworn to by its treasurer on July 31, 1902 (p. 12). Upon such sum the Comptroller, in accordance with the provisions of section 184, levied a tax of .5 of 1 per cent.

On August 6, 1903, the relator made a report of its gross earnings in the State of New York *for the year ending June* 30, 1903, as follows:

> "Gross earnings on business *commenced and terminated in the territorial limits of New York* derived from towing charges upon the Hudson River (navigable waters of the United States), earned with vessels enrolled and licensed by the United States Government, i. e., business which is regulated by the United States Government, and which it is claimed is not taxable by the State of New York — $394,505.59" (pps. 3, 16).

However, the vice-president of the relator, who made such report amended it by an affidavit, verified September 26, 1903 (pp. 3, 15). The provisions of this affidavit are set forth and considered fully under Point III of this brief.

Upon these reports the Comptroller assessed taxes for the years in question, under section 184 of the Tax Law to the amount of $1,885.73, less a rebate of $942.86, and $1,972.52 respectively (pp. 3, 4).

A hearing was had before the Comptroller on February 17, 1903, upon the relator's request *for a revision of the tax for* 1902 and testimony was given at such hearing by Mr. Amos Van Etten,

who appeared for the company at such hearing (pp. 12–14). At such hearing Mr. Van Etten testified as follows, speaking of the relator's report for 1902:

> "Q. So in your report filed here you did not include earnings from the tugs, operating between New York Harbor and points outside the State?
>
> "A. No,— *business which was enroute from one state to another has been deducted and called interstate business.*
>
> "Q. So you base your claim that you are not taxable, so far as the business done in this state is concerned, upon the proposition that your business is entirely done in New York Harbor and the Hudson River which you claim is a part of the ocean?
>
> "A. Yes.
>
> "Q. That is under —
>
> "A. The Federal Government.
>
> "Q. You claim it is not taxable?
>
> "A. Yes" (pps. 13, 14).

On the hearing for the revision of the 1903 tax the relator submitted the supplemental return note above of its vice-president, *amending its report for* 1903 (p. 15). No testimony was taken. After such hearings the Comptroller declined to readjust his assessments for the years in question and made his final determination, dated September 19, 1904, holding "that the assessment heretofore made against the said Cornell Steamboat Company does not include taxes which could not have been lawfully demanded and, therefore, declines to make any revision or readjustment of the same" (p. 11 of record).

Thereupon the plaintiff in error herein, the Cornell Steamboat Company, made application in the

Supreme Court of the State of New York for a writ of error to review the aforesaid determination of the Comptroller (pp. 2, 3, 4, 5, 6 and 7 of the record). An order for the writ was made by a justice of the Supreme Court on October 15, 1904 (p. 7 of record), and the writ of certiorari issued from the Supreme Court of the State of New York on the 15th day of October, 1904 (pp. 9, 10 and 11 of record).

Thereupon a return was filed in the Supreme Court by the then Comptroller of the State of New York on the 17th day of November, 1904 (pp. 18 and 19 of record). Thereafter and in the term of the Appellate Division of the Third Department of the Supreme Court of the State of New York, commenced on November 14, 1911, said court confirmed the aforesaid determination of the Comptroller in an order made during that term directing that the determination of the Comptroller be unanimously confirmed, with $50 costs and disbursements (pp. 18 and 19 of the record). Whereupon the plaintiff in error herein took an appeal to the Court of Appeals in February, 1912; on January 21, 1912, the Court of Appeals of the State of New York handed down its decision and made its order directing that the aforesaid order of the Appellate Division of the Supreme Court appealed from be affirmed, with costs, and that the record be remitted to the Supreme Court of the State to be proceeded upon according to law (pp. 20 and 21 of record). Thereafter the remittitur of the Court of Appeals was filed in the Albany county clerk's office of the State of New York and an order made by the Supreme Court on July 17,

1912, directing that the order and judgment of the Court of Appeals be made the order and judgment of the Supreme Court (pp. 20, 21 and 22 of the record).

Thereupon the plaintiff in error, through its counsel, made application to the Hon. Edgar M. Cullen, chief justice of the Court of Appeals of the State of New York (pp. 24, 25 and 26 of the record), asking for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York, to bring before the said Supreme Court of the United States the record in this proceeding (pp. 22 and 23 of the record). The petition of the plaintiff in error was granted and a writ of error was issued on October 12, 1912. The proceeding was thereupon docketed in this court where it has since remained awaiting argument.

SPECIFICATIONS OF THE ERRORS RELIED UPON BY THE PLAINTIFF IN ERROR IN THIS COURT.

They are well stated by the counsel for plaintiff in error on page seven of his brief, as follows:

1. The Supreme Court of the State of New York erred in rejecting the claim of the plaintiff in error that the earnings upon which the taxes were imposed were not included in the exemption contained in section 184 of the Tax Law, which excepted from the operation of that section "earnings derived from business of an interstate character."

2. Such court erred in rejecting the claim of the plaintiff in error that the earnings upon which

the taxes were imposed could not, under subdivision 2 of section 8 of article 1 of the Constitution of the United States, be subjected to a tax imposed by the State of New York.

3. Such court erred in upholding the claim of the defendant in error that the taxes imposed on the earnings of the plaintiff in error, derived from its towing business on the navigable waters of the United States, with vessels of the United States, which were manned by employees licensed by the United States, were such taxes as the State of New York could lawfully exact and demand.

The propositions involved in these specifications of error will be discussed in this brief under the following points:

Point I. The construction of the Court of Appeals of the State of New York of the phrase in section 184 of the Tax Law, "earnings derived from a business of an interstate character," must be accepted by this court as a conclusive decision of the question; and this court will accept the application of the statute made by the Court of Appeals to the facts of the case at bar; in other words, the decision of the Court of Appeals of the State of New York, that the gross earnings upon which the taxes were imposed were not included in the exemption contained in section 184 of the Tax Law, is conclusive upon this court and will be accepted by it as correct in its consideration of this case.

Point II. A tax imposed under section 184 of the Tax Law on a domestic corporation of the State of New York for the privilege of exercising its corporate franchises, measured by the gross earnings from business done on navigable waters of the United States, is not an interference with

federal control of such waters nor an interference with interstate commerce.

Point III. The gross earnings by which the taxes on the corporate franchises was measured were not derived from a business of an interstate character.

Point IV. Even if the gross earnings were derived from business of an interstate character, yet the State could constitutionally and legally measure its tax, on the exercise of the franchises of its domestic corporations, by such gross earnings.

STATE STATUTES UNDER WHICH THE TAX WAS LEVIED.

The taxes in controversy were levied under article 9 of the Tax Law of the State of New York, being chapter 62 of the Laws of 1909, which chapter became a law February 17, 1909. Article 9 of the Tax Law is entitled "Corporation Tax," and comprises sections 180 to 270, inclusive.

The section of this article under which the taxes in controversy were levied was section 184 of the Tax Law, entitled "additional franchise tax on transportation and transmission corporation and association." However, this section must be read in connection with section 182, inasmuch as the tax imposed in section 184 is an "additional franchise tax" to that imposed in section 182.

Section 182, in so far as it is material to this controversy, is as follows:

> "Franchise tax on corporations.— For the privilege of doing business or exercising its corporate franchises in this state every cor-

poration, joint-stock company or association, doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount."

The rest of the section is taken up with the mode and procedure of the assessment of the taxes so imposed. Corporations are divided into four classes, as follows:

(a) Corporations the dividends of which upon the capital stock amount to 6 or more than 6 per centum upon the par value of the capital stock during the preceding year. These corporations are taxed at the rate of one-quarter of a mill for each 1 per centum of dividends made or declared

HISTORY OF SECTIONS 182 and 184: Corporate franchise taxation was inaugurated in the State of New York by Chapter 542 of the Laws of 1880. By section 3 of that act all corporations, with certain exceptions, were subjected to a corporate franchise tax based on capital stock. This is now section 182 of the Tax Law.

By section 6 of that act it was provided, "*In addition to the tax above provided for*, Every corporation formed for railroad * * * or transportation purposes, and every elevated railroad, and every other corporation * * * doing business in this State, and owning, operating or leasing to or from another corporation, * * * any railroad * * * route or line * * * shall pay to the State Treasurer * * * a tax of five-tenths of one per cent upon the gross earnings in this State of said corporation or company * * *. Nothing in this section shall be held to apply to any street surface company."

This act of 1880 was amended the next year by chapter 361 of the Laws of 1881; the aforesaid section 6 was not amended in any respect affecting the questions involved here, except that the last sentence excepting street surface railways from the gross earnings tax was removed.

In 1896 the Tax Law was revised (chapter 908, Laws of 1896); section 3 of the original act of 1880 became section 182 of the Tax Law. The exemptions contained in paragraph 3 became section 183; paragraph 6 became section 184, and an entirely new section, section 185, was enacted.

Since 1896 section 182 was amended by chapter 369 of the Laws of 1897, chapter 448 of the Laws of 1901, chapter 474 of the Laws of 1906, and chapter 474 of the Laws of 1907, but in no particular that substantially affects the question herein involved.

Since 1896 section 184 was amended by chapter 734 of the Laws of 1907, but in no particular which substantially affects the questions herein involved.

upon the par value of the capital stock during the preceding year.

(b) Corporations whose dividends amount to less than 6 per cent. on the par value of the capital stock, and (1) the assets of which do not exceed the liabilities, exclusive of capital stock, or (2) the average price at which such stock sold during said year did not equal or exceed its par value, or (3) if no dividend was declared. These corporations are taxed at the rate of three-fourths of one mill, and this rate is not on the par value, but upon the net value of such stock.

See

People ex rel. New York Mail and Paper Transportation Co. v. *Gaus, as Comptroller*, 198 N. Y. 250.

People ex rel. Fifth Avenue v. *Williams*, 198 N. Y. 238.

(c) Corporations whose dividends amount to less than 6 per centum on the par value of their capital stock, and (1) the assets of which exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or (2) the average price at which such stock sold during the preceding year is equal to or greater than the par value. Corporations coming within this class are taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this state, etc.

Then comes section 183, entitled "Certain corporations exempt from tax on capital stock." This section exempts from the payment of taxes

prescribed by section 182, certain corporations such as banks, savings banks, laundrying corporations, manufacturing corporations, to the extent only of the capital actually employed in this State in manufacturing, if at least 40 per centum of their capital is invested in this State for use by them in manufacturing, etc.

Then comes section 184, entitled, as we have observed, "Additional franchise tax on transportation and transmission corporations and associations," which reads as follows:

SECTION 184.

"Every corporation and joint-stock association formed for steam surface railroad, canal, steamboat, ferry, express, navigation, pipe-line, transfer, baggage, express, telegraph, telephone, palace car or sleeping car purposes, and every other transportation corporation not liable to taxation under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character."

Section 185 of this article of the Tax Law imposes a corporate franchise tax on elevated railroads or surface railroads not operated by steam.

Section 186 imposes a corporate franchise tax on waterworks companies, gas companies, electric or steam heating, light and power companies.

Section 187 imposes a franchise tax on insurance corporations.

Section 188 imposes a corporate franchise tax on trust companies; section 189 a corporate franchise tax on savings banks; section 191 a tax upon foreign bankers.

Section 192 requires corporations liable to pay corporate franchise taxes under section 182 to file a written report with the State Comptroller of its condition at the close of its business on October 31st preceding and on or before November 15th in each year. Paragraph 2 of this section requires transportation or transmission corporations "liable to pay an additional tax under section 184 of this chapter," to make a written report of its condition at the close of its business on June 30th preceding and on or before August 1st in each year, stating the amount of its "gross earnings from all sources," and the amount of its gross earnings from its transportation or transmission business originating and terminating in this State.

Section 195 of the Tax Law provides that the Comptroller from the reports or any other data which shall be satisfactory to him will order and state an account for the taxes due the State, etc.

Section 196 of the law provides that upon his auditing and stating his account for taxes, he shall forthwith send notice of the corporation tax.

Section 197 of the law provides that the tax imposed by section 182 shall be due and payable into the State Treasury on or before January 15th of each year; a tax imposed by section 184 is due and payable into the State Treasury on or before August 1st of each year.

Section 198 provides that an application for re-

vision and readjustment of the account may be made to the Comptroller by any company aggrieved within one year from the time such account was audited; and the Comptroller must send a written notice of his determination to the applicant.

Section 199 provides that the determination of the Comptroller upon application by any company aggrieved may be reviewed "both upon the law and the facts upon certiorari by the Supreme Court." This application must be made within thirty days after the service of the notice of such determination.

Section 201 provides for a warrant for the collection of taxes being issued at the expiration of thirty days after the sending by the Comptroller of the notice of the statement of an account as provided in the article.

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POINTS.

I.

THE CONSTRUCTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK OF THE PHRASE IN SECTION 184 OF THE TAX LAW, "EARNINGS DERIVED FROM A BUSINESS OF AN INTERSTATE CHARACTER," WILL BE ACCEPTED BY THIS COURT AS THE DECISIVE OF ITS CONSTRUCTION; AND THIS COURT WILL ACCEPT THE APPLICATION OF THE STATUTE MADE BY THE COURT OF APPEALS TO THE FACTS OF THE CASE AT BAR; IN OTHER WORDS, THE DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, THAT THE EARNINGS UPON WHICH THE TAXES WERE IMPOSED WERE NOT INCLUDED IN THE EXEMPTION CONTAINED IN SECTION 184 OF THE TAX LAW, IS CONCLUSIVE UPON THIS COURT AND WILL BE ACCEPTED BY IT AS CORRECT.

Counsel for the plaintiff in error asserts as No. 1 of his specifications of errors, as follows:

> "The Supreme Court of the State of New York erred in rejecting the claim of the plaintiff in error that the earnings upon which the taxes were imposed were not included in the exemption contained in section 184 of the Tax Law, which excepted from the operation of that section, 'earnings derived from business of an interstate character'."

It is true that the Court of Appeals of the State of New York did reject the claim of the plaintiff in error that the earnings upon which the taxes were imposed were not included in the aforesaid exemption contained in section 184 of the Tax Law; and by such rejection decided finally and conclusively that the gross earnings reported to the State Comptroller for the years ending June 30, 1902, and June 30, 1903, respectively, amounting to the sums of $377,146.33 and $394,555.09, were gross earnings not within the aforesaid exemption and, therefore, were "earnings not derived from business of an interstate character."

It is the contention, therefore, of the defendant in error herein, that this court is bound, under well established authorities in this court, by such interpretation and construction of the provisions of section 184; and that this court in deciding the questions involved here must accept the decision of the Court of Appeals of the State of New York that the aforesaid earnings "were not derived from business of an interstate character."

It will be the contention of the defendant in error in this brief, under Point III, that the State of New York had the right to measure the corporate franchise tax imposed by section 184, even "by earnings derived from business of an interstate character." However, the Legislature of the State of New York when they enacted section 184, deemed it wise to exempt earnings of this character from the imposition of this tax. Therefore, it being a State statute, enacted by the State Legislature in the interest of the State, the construction of this exemption by the courts

of the State of New York is conclusive upon this court.

Post v. *Supervisor*, 105 U. S. 667.
Manley v. *Park*, 187 U. S. 547.
Wilkes County v. *Kohler*, 180 U. S. 506.
Louisville & Nashville Railroad v. *Kentucky*, 183 U. S. 503.
Baccus v. *State of Louisiana*, 232 U. S. 337.

In the case of *Baccus* v. *State of Louisiana*, *supra*, Mr. Chief Justice White said, at page 337:

> "We accept the construction affixed by the court below to the statute and upon which alone it could in reason have held that the acts charged were embraced by its provisions. We hence disregard an intimation made in the argument of the defendant in error, that the statute is susceptible of a different interpretation and therefore that the claim of Federal right which was made below and which was necessarily passed upon need not be here considered. It is inconceivable that the statute should mean one thing for the purpose of determining whether the acts charged were within its terms and should then be held to mean another, for the purpose of escaping the Federal question."

II.

A TAX IMPOSED UNDER SECTION 184 OF THE TAX LAW OF THE STATE OF NEW YORK ON A DOMESTIC CORPORATION OF THE STATE OF NEW YORK FOR THE PRIVILEGE OF EXERCISING ITS CORPORATE FRANCHISE, MEASURED BY THE GROSS EARNINGS OF BUSINESS DONE ON NAVIGABLE WATERS OF THE UNITED STATES, IS NOT AN INTERFERENCE OF FEDERAL CONTROL OF SUCH WATERS.

> "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution."
>
> *Munn* v. *Illinois*, 94 U. S. 113, 135.

(a) THE TAX IMPOSED BY SECTION 184 IS A TAX UPON THE EXERCISE OF CORPORATE FRANCHISES AND NOT A TAX DIRECTLY ON PROPERTY OR GROSS EARNINGS.

As was said by the Supreme Court in *Flint* v. *Tracy Co.*, 220 U. S. 108, at page 163, holding the Federal Corporation Tax constitutional:

> "The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."

The title of section 184 clearly shows its nature and object; "*Additional* franchise tax on transportation and transmission corporations and associations." This can only mean that a corporate franchise tax in addition to that imposed by section 182 is required of transportation and transmission corporations. This section itself declares:

"That every corporation * * * shall pay *for the privilege of exercising its corporate franchises or carrying on its business of such corporate or organized capacity* in this state an annual excise tax or license fee * * * upon its gross earnings within this state * * *."

A comparison of the provisions of this section with those of section 182 discloses that the tax imposed in section 184 is of identically the same nature as that imposed in section 182. The tax under section 182 is concededly a tax on the exercise of corporate franchises as counsel admits in his brief. As authorities, see

People ex rel. C. T. R. v. *Miller*, 178 N. Y. 194.

People ex rel. Penn. R. R. Co. v. *Knight*, 171 N. Y 354.

The distinctive character of a tax on corporate franchises was clearly pointed out in the case of

People v. *Home Insurance Company*, 92 N. Y. 328; affd., 134 U. S. 594.

In that case the corporate franchise tax was measured in part by United States bonds and the Supreme Court of the United States, in upholding the constitutionality of the tax, said:

"By the term 'corporate franchise or business,' as here used, we understand is meant * * * the right or privilege given by the state to two or more persons of being a corporation; that is, of doing business in a corporate capacity. * * * The granting of such right or privilege rests entirely in the discretion of the state, and of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may re-

> quire, as a condition of the grant of the franchise and also of its continued exercise, that the corporation pay a specific sum to the state each year or month, *or a specific portion of its gross receipts*, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem best to adopt in fixing the amount for any year which it will exact for the franchise." (Italics ours.)

The same principle was reiterated in respect to letters patent and copyrights in the case of

> *People ex rel. U. S. A. P. P. Co.* v. *Knight*, 174 N. Y. 475,

where the case—*People ex rel. Johnson Co.* v. *Roberts*, 159 N. Y. 70, was overruled.

The power of Congress over navigable streams is derived from two clauses in the Constitution: (1) The commerce clause (art. 1, § 8, subd. 3), giving Congress power "to regulate commerce with foreign nations, and among the several states," and (2) the clause providing that the judicial power of the United States "shall extend to all cases of admiralty and maritime jurisdiction," (art. 111, § 2, subd. 1). The latter clause is held to give Congress power to enact and amend the general maritime code of the country although the clause itself relates only to the jurisdiction of the courts.

> *Butler* v. *Boston Steamship Co.*, 130 U. S. 527.
> *In re Garnett*, 141 U. S. 1.

Within the limits set by these two clauses the power of the federal government over navigable

waters is absolute and exclusive. But that power relates to the subjects specified in the Constitution and is not determined by places in which it is to be exercised. It is an express power over interstate commerce and maritime matters. It is, so far as the waterways themselves are concerned, a derived power. *The result is that in legislating with regard to waterways the power of Congress extends only to regulation for the purpose of promoting or protecting interstate commerce and to regulation of maritime matters.* It is a jurisdiction over the subject-matter of the traffic carried on over navigable streams, and only incidentally over the streams themselves in the interest of such traffic.

The State of New York succeeded after the Revolution to all the powers of the King and Parliament with respect to navigable waters within its boundaries, subject only to the limitations placed on those powers by the United States Constitution.

People v. *N. Y. & S. I. Ferry Co.*, 68 N. Y. 71.
Langdon v. *The Mayor*, 93 N. Y. 129.

The limitations placed on those powers by the Constitution are with respect to the maritime jurisdiction and interstate commerce. So long as this State does not regulate either of these matters its laws affecting business on the Hudson river are valid, and the mere fact that the Hudson is navigable does not preclude the State from regulating its use.

There is no suggestion in the record that the taxation of the relator's business conflicts with any regulation of the Hudson river by the federal

authority, excepting in the matter of interstate commerce and which will be considered later. No specific act of Congress with which the tax law conflicts, is mentioned. The State has the power to regulate the use of the river, provided only that it does not regulate interstate commerce thereon.

If the Tax Law were a maritime law it might possibly interfere with some federal provision of the maritime code, but it has obviously nothing to do with the maritime or admiralty jurisdiction. It does not relate to obligations or rights of ship owners, or crews, or owners of cargoes among themselves. It does not fix rules of navigation. It does not and cannot conflict with any part of the maritime law of the country and no other law of Congress is pointed to as being in conflict with it. The Tax Law has been treated in the argument as a regulation of the waterway, and even if such assumption is correct it is submitted that the Tax Law is valid. That law is not a regulation of the stream; it is a regulation of the business upon it and only of the business within the State.

Gloucester Ferry Co. v. *Penn.*, 114 U. S. 211.

For the tax is imposed on a corporation for the privilege of exercising its franchise and carrying on business, but it does not regulate the stream or its use as a waterway. It regulates the business, not the river. Congress has exclusive power to regulate interstate commerce, and under that power or under its maritime jurisdiction it may regulate the use of the river. *But the law of a State, which does not regulate interstate com-*

merce or the use of the stream, does not trench upon the federal powers.

For the proposition that such a tax as is imposed by section 184 is not regulative of commerce, we have controlling authority in the case of

Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217.

In this case the defendant was a Canadian corporation with its principal place of business at Montreal. In 1853 that company leased certain railroads in Maine and since that time used its franchise in operating the road. In 1888 the State of Maine enacted a statute that every corporation, person or association operating a railroad in the State should pay to the State Treasurer for the use of the State "an annual excise tax for the privilege of exercising its franchise" in the State, and it provided that the amount of tax should be ascertained as follows:

> "The amount of the gross transportation receipts, as returned to the railroad commissioners for the year ending on the thirtieth of September next preceding the levying of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile; when such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax shall be equal to one-quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars, and do not exceed three thousand dollars, the tax shall be equal to one-half of one per centum of the gross receipts; and so on, increasing the rate of the tax one-quarter of one per centum for each additional seven hundred and fifty dollars of average gross receipts per mile or fractional part thereof, etc."

Under this statute the Grand Trunk Railway Company made its return of the gross transportation receipts over its road for the years 1881 and 1882, and a tax on the statute was thereupon assessed for 1881 in the sum of $9,569.66, and for 1882 in the amount of $12,095.52. Thereupon the Grand Trunk Railway Company brought an action of debt to recover these amounts in the Supreme Judicial Court of the State of Maine, and on the application of the Grand Trunk railroad it was transferred to the Circuit Court of the United States.

The Circuit Court of the United States gave judgment for the defendant and from that judgment the case was brought to this court on writ of error. This court reversed the judgment of the lower court and remanded the case with the direction to enter judgment in the favor of the State for the amount of the taxes demanded, and it was so ordered. This court, through Mr. Justice Field, said on page 227 of the opinion:

> "The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a

State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed."

This court further said, at page 228:

"The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and, therefore, in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the

same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

It will be observed in this case, that the statute involved is almost identical in substance with section 184 of the Tax Law of the State of New York under discussion. The Maine statute imposed a corporate franchise tax for the privilege of exercising corporate franchise in that State and measured it by the gross earnings of the railway companies covered in the mode prescribed in the statute. Further, it will be observed that the Grand Trunk railway was a *foreign or Canadian corporation* which was being taxed, while in the case at

bar, the plaintiff in error, The Cornell Steamboat Company, is a domestic corporation deriving its corporate franchise and its capacity to act as a corporate entity from the sovereign State of New York which, in section 184, is taxing such corporation for the privileges accorded it by a sovereign; so that on account of that element it is a stronger case than the *Grand Trunk* case. If, therefore, the Maine statute in the *Grand Trunk* case did not conflict with the Constitution of the United States and was not a violation of interstate commerce, how can section 184, the statute under consideration here, be considered either unconstitutionally or an interference with interstate commerce?

This case of *Maine* v. *The Grand Trunk Railroad Company*, *supra*, which was decided by this court at its October Term, 1891, has never been modified since its decision by this court, nor has its authority been invalidated in any respect; on the contrary, it has been repeatedly cited by this court as authority from the time of its decision up to the present time, and it is today an authoritative decision of this court upon the questions involved therein.

This will appear from the following cases in which the case has since been cited as authority:

Hanley v. *Kansas City Southern Railway Co.*, 187 U. S. 617 (1902).

Michigan Central Railroad v. *Powers*, 201 U. S. 245, 296 (1905).

Galveston, Harrisburg & San Antonio Railway v. *State of Texas*, 210 U. S. 217, 226 (1907).

Flint v. *Stone Tracy Company*, 220 U. S. 107, 165 (1910).

Oklahoma v. *Wells Fargo & Co.*, 223 U. S. 298, 301 (1911).

United States Express Co. v. *Minnesota*, 223 U. S. 335, 344 (1911).

Ewing v. *Levingworth*, 226 U. S. 464, 469 (1912).

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 83 (1913).

As was said in the latest case cited, *Baltic Mining Company* v. *Massachusetts*, *supra*, on page 82:

> "While this is true (the prohibition to the State by the Constitution of efforts to tax the carrying on of interstate commerce in the attempt to levy tax upon the receipts of interstate commerce as such), other equally well established principles must be borne in mind in considering the validity of a state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. (United States Express Co. v. Minnesota, 223 U. S. 335, 344.) It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the State, has been sustained. (Maine v. Grand Trunk Railway Co., 142 U. S. 217; Provident Institution v. Massachusetts, 6 Wall. 611; Hamilton Co. v. Massachusetts, 6 Wall. 632; Flint v. Stone-Tracy Co., 220 U. S. 107, 162–5; United States Express Co. v. Minnesota, 223 U. S. 335.)"

All that is attempted in section 184 of the Tax Law of the State of New York is to tax a corpo-

rate franchise tax using the gross earnings of the company as a measure for the value of the exercise of such franchise. The statute itself excludes "earnings derived from a business of interstate character," and the Court of Appeals of the State of New York has decided that the earnings upon which the tax is imposed in this case does not come within such statutory prohibition of the section.

In *Flint* v. *Stone Tracy Company, supra*, this court said, at page 165:

> "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connection Maine v. Grand Trunk Ry. Co., 142 U. S. 217, as interpreted in Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 226."

The case referred to in the above excerpt entitled *Galveston, Harrisburg & San Antonio Railway Company, supra*, concerns a Texas statute which imposed a tax upon railway companies equal to 1 per centum of their gross receipts. The act in question is entitled "An Act imposing a tax upon railroad corporations * * * and

other persons * * * owning * * * or controlling any line of railroad in this State * * * equal to one per cent. of their gross receipts * * * and repealing the existing tax on the gross passenger earnings of railroads." In section 1 of the statute it imposed upon such railroads "an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the State." An action was brought against certain railroads to recover the tax and penalties provided. The Supreme Court of the State of Texas held the penalties to be void under the Constitution to uphold the tax. By writ of error it was brought up to this court upon the ground that the law upon which the actions were based was an attempt to regulate commerce among the States. This court reversed the judgment of the Texas court; Mr. Justice Harlan, Mr. Justice White and Mr. Justice McKenna dissenting. Mr. Justice Holmes wrote the prevailing opinion in which he held that the statute levying the tax in question amounted to "an attempt to regulate commerce among the states" (p. 227). He said, on page 228: "This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" In regard to the case of *Maine* v. *Grand Trunk Railway Company, supra*, he said, on page 226:

> "In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 'an annual excise tax for the privilege of exercising its franchise,' was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts

per mile multiplied by the number of miles within the State when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See Ficklen v. Taxing District of Shelby County, 145 U. S. 1, 23; Postal Telegraph Cable Co. v. Adams, 155 U. S. 688; McHenry v. Alford, 168 U. S. 651, 670, 671."

As I have pointed out, four justices of this court, including its chief justice, dissented from this decision; yet the majority of the court did not repudiate the case of *Maine* v. *Grand Trunk Railway Company, supra*, but proceeded to distinguish it, holding distinctly that it was distinguished from the case at bar. Indeed the discussion of Mr. Justice Holmes precisely makes the distinction by which the case at bar differs from the *Galveston* case. Justice Holmes says in the excerpt above that the gross receipts were "a measure of the value of the property per mile;

that the effort of the State was to reach that value and not to fasten on the receipts from transportation." Section 184 imposing the tax in question shows plainly that the gross receipts of the plaintiff in error were not taxed and were not fastened upon such gross receipts, but was simply the measure of the tax which the sovereign State of New York was imposing for the privilege of plaintiff in error for exercising its corporate franchises during the year in question.

In the case of *New York ex rel. Annen* v. *Walsh*, which was argued with the case of *Budd* v. *New York*, 143 U. S. 517, Annen was the owner of floating elevators which were moved from point to point in the harbor of New York and it was in this respect alone that his case differed from that of Budd. In upholding the constitutionality of a statute regulating elevating charges, this court in that case said of such floating elevators:

> "So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the State of New York. It operates only within the limits of that State, and is no more obnoxious than was the statute of Illinois in respect to warehouses, in Munn v. Illinois. It is of the same character, with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State, and other kindred laws."

It is, therefore, respectfully submitted that section 184 of the Tax Law of the State of New York, under which the tax imposed involved in this warrant and proceeding, does not violate sub-

division 3 of section 8 of article 1 of the Constitution of the United States; and it is further submitted that the Court of Appeals did not err in upholding the claim of the defendant in error that the tax imposed upon the plaintiff in error, derived from its doing business on the navigable waters of the United States, with vessels of the United States, which were manned by employees licensed by the United States, were such taxes as the State of New York might lawfully exact and demand.

III.

THE GROSS EARNINGS BY WHICH THE TAX ON THE CORPORATE FRANCHISES OF THE RELATOR IS MEASURED WERE NOT DERIVED FROM BUSINESS OF AN INTERSTATE CHARACTER.

At the outset it should be remembered that the burden rests with the relator to show that the determination of the Comptroller is erroneous and it is the established principle of law that the Comptroller's determination must stand unless clearly shown to be erroneous.

> *People ex rel. Roebling's Sons* v. *Wemple*, 138 N. Y. 582, at p. 587.
> *People ex rel. Western Electric Co.* v. *Campbell*, 145 N. Y. 587.

Also, the principle laid down in

> *Penn. R. R. Co.* v. *Knight*, 192 U. S. 21, at p. 27; affg. 171 N. Y. 354,

should be remembered in connection with the questions here involved. There the court said:

> "As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. *But when service is wholly within a State, it is presumably subject to state control.* The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction."

The relator in his report for the year 1903, and sworn to by its vice-president, on September 17, 1903, stated that its gross earnings for that year, amounting to $394,505.59, was derived from business "commenced and terminated in the territorial limits of New York."

However, this was supplemented by an affidavit made by its vice-president, on September 26, 1903, in which he makes the following statement:

> "That the statement in said report of business commenced and terminated within the territorial limits of the State of New York, derived from towing charges upon the Hudson River, is made up largely of towing done in the following manner, as deponent knows from personal knowledge and information derived from the Superintendent of the Company, to wit:
>
> "Tows for upriver points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken out to the stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river is in the territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn.
>
> "Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York

> and New Jersey, to such extent as the State of New Jersey is included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State."

Section 184 provides that the gross earnings upon which the corporate franchise tax is measured "shall include its gross earnings from its transportation or transmission business originating and terminating within this State, but shall not include earnings derived from business of an interstate character." In the aforesaid amendatory affidavit it appears that a part of the relator's towing business on the Hudson river has for its south terminus, the stake boats off Weehawken. The north terminus is not stated and must be assumed to be in New York as there are no ports in New Jersey north of Spuyten Duyvil. The affidavit of Coykendall states generally that the stake-boat is in the territory of New Jersey but this is controlled by the specific statement that the stake-boats are located in the river south of Weehawken ferry. By article 2, section 7, of the State law the boundary between New York and New Jersey is fixed in the middle of the river, *except* that the jurisdiction of New York extends over the entire river lying west of Manhattan Island up to low-water mark on the west shore; New Jersey having title to the land under the river, and jurisdiction over the wharves and docks on the west shore and over vessels attached to the same, and New York having jurisdiction over the whole river between Manhattan Island and low-water mark on the Jersey shore. The treaty of 1833, which is ratified and confirmed by the State law, provides:

"Article First.— The boundary line between the two states of New York and New Jersey, from a point in the middle of the Hudson river opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan bay, to the main sea, *except as hereinafter otherwise particularly mentioned.*" (Italics ours.)

"Article Third.— The State of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York, and of and over all the waters of the Hudson river lying west of Manhattan island and to the south of the mouth of Spuyten Duyvil creek, and of and over the lands covered by the said waters to the low-water mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York and west of the middle of that part of the Hudson River which lies between Manhattan island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and improvements made, and to be made, on the shore of the said state, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed." (Section 7, State Law.)

It will be noticed by the above treaty that the State of New York has exclusive jurisdiction over the waters of the bay of New York and over the waters of the Hudson river lying west of Manhattan Island up to the mouth of Spuyten Duyvil creek to the low-water mark on the westerly New Jersey shore. This jurisdiction over the waters of the Hudson river and New York bay was no gratuity bestowed on the State of New York by the State of New Jersey. The State of New York had always claimed the boundary line to be at the low-water mark on the westerly side of the water between the two States. *New York had always exercised exclusive sovereign and governmental jurisdiction over the islands and waters between the two States and this jurisdiction was not conferred upon her in the treaty of* 1833, *but was retained by her in the second article.* In 1830, at the adoption of the Revised Statutes (1 R. S. 61), the claim of New York was unequivocally asserted to the low-water mark on the New Jersey shore of the waters dividing the two States and it was this assertion of title on the part of the State of New York that attracted the attention of New Jersey and led to the appointment of the commissioners by the two States in 1833, who made the above treaty.

Therefore, the territorial boundary between the States of New York and New Jersey on the surface of the waters of the Hudson river up to Spuyten Duyvil creek and in New York bay, is the low-water mark on the New Jersey shore. On the surface of the water the jurisdiction of New York extends to the New Jersey shore. A boat on the surface, not attached to a wharf, is in New York.

(See *Carlin* v. *R. R. Co.*, 135 App. Div. 876, 880.) The object of the treaty of 1883, which was ratified by statute, was to promote commerce by placing it entirely within the jurisdiction of one State. (*Ferguson* v. *Ross*, 126 N. Y. 463.) To hold that a vessel in the river off Weehawken is in New Jersey would defeat the very purpose of the treaty. The stake-boats off Weehawken must be within New York, if they are within waters within its jurisdiction and business originating at such stake-boats originated in New York. The exact terminus of the traffic up the river is not stated, but it is obviously the intent of the deponent to show that it was in New York, for his affidavit is intended to show that it began in New Jersey and ended in another State; and an examination of the map will show that all ports on the Hudson north of Spuyten Duyvil creek are in New York. It is submitted that this traffic began and ended in the State of New York. It is probably true that many of the tows passed through the State of New Jersey for the west half of the Hudson for about ten miles north of Spuyten Duyvil creek is within New Jersey, and if the tows kept to the west of the center of the stream they were for those few miles in New Jersey. But does this constitute interstate commerce?

It has been held by the United States Supreme Court that transportation of goods by railroad from one point within a State to another point within it, but passing through another State during transit, is not an interstate shipment and does not constitute interstate commerce. (*Lehigh Valley R. R. Co.* v. *Pennsylvania*, 145 U. S. 192.) In the case cited the State of Pennsylvania imposed a tax upon the Lehigh Valley railroad on ac-

count of the transportation of merchandise from one point to another within the State but passing in transit through another State. This was held not to be a tax on interstate commerce.

In the *United States ex rel. Kellogg* v. *Lehigh Valley R. R. Co.*, 115 Fed. Rep. 373, it was held that a shipment from Buffalo to New York, which passed in transit through Pennsylvania and New Jersey, was not an interstate shipment since it began and ended in New York State.

It is true that the Supreme Court in an earlier case than *Lehigh Valley R. R. Co.* v. *Penn.* (*supra*) expressed an opinion that may be deemed inconsistent with its later ruling. In *Lord* v. *Steamship Co.*, 102 U. S. 541, the question was whether Congress had power to limit the liability of owners of a vessel navigating between two points in California, but whose voyages were wholly on the ocean. It was held that Congress had such power, and the opinion was based on the right of Congress to regulate commerce. The decision in this case has not been overruled, but the ground on which the decision was placed has been expressly disapproved in the *Lehigh Valley* case, in which Chief Justice Fuller says, referring to the *Lord* case:

> "It was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley in In re Garnett, 141 U. S. 1, 12: 'The act of Congress which limits the liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate com-

> merce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.'"

From the foregoing authorities it appears that the law is now well settled by the Supreme Court that there is no distinction between transportation by rail and by water. In either case the transportation of goods between two points in the same State, but through another State, is not interstate commerce. The Court of Appeals has recognized that this is the present state of the law. In *People ex rel. Pennsylvania R. R. Co.* v. *Knight*, 171 N. Y. 364, Judge Cullen says, after discussing the *Lehigh Valley* case, the *Lord* case and the *Garnett* case:

> "It will thus be seen that the control of Congress over ships, vessels and the navigation of public waters has finally been placed by the Supreme Court of the United States on the solid foundation of the maritime and admiralty jurisdiction of the Federal government, and that while the decisions actually made in the Daniel Ball and Lord cases remain the law the grounds on which they proceeded are no longer deemed tenable and the opinions rendered in those cases no longer authorities."

Judge Vann has defined interstate commerce thus: "Interstate commerce, or commerce among the States, means the exchange of property in one State for property in another State." (*People ex rel. Hatch* v. *Reardon*, 184 N. Y. 452.) This towing business involved no exchange of property in New York for property in New Jersey and no carriage from one State to the other.

It must follow that the shipment of goods from

a point in the Hudson river off Weehawken which is within New York State, through New Jersey, to another point in New York State, is not an interstate shipment and not an interference with the exclusive control of Congress over interstate commerce.

It is, of course, true that a shipment between two points in the same State may be interstate commerce, provided such shipment is part of a continuous carriage between points in different States. But the present case does not show a state of facts to bring it within the rule. The towing company did not operate under any through bill of lading or participate in through rates charged for the carriage of goods between two States. Apparently there was a special contract for a special service rendered. The relator had no interest, so far as appears, in any freight rates collected by the owners of the vessels towed. Even if the cargoes were ultimately destined for some other State than New York, the towing service was no part of a continuous carriage between States.

U. S. ex rel. Interstate Commerce Com. v. *Chicago K. & S. R.*, 81 Fed. 783.
Chicago N. W. R. R. v. *Osborne*, 10 U. S. App. 430.
People ex rel. Penn. R. R. v. *Knight*, 171 N. Y. 364; affd., 192 U. S. 21, with opinion, see p. 27.
Budd v. *New York*, 143 U. S. 517.

The tug of the relator was no more a part of interstate commerce than the cab of the Pennsylvania railroad, which carries a passenger ar-

riving in New York from the ferry to the Grand Central station, though the passenger and his baggage may be bound from Chicago to Boston (*People* v. *Knight, supra*); or " than the dray or cart by which grain would be transferred from one railroad station to another " (*Munn* v. *Illinois,* 94 U. S. 113); or the elevation of grain. (*Budd* v. *New York, supra.*)

In this connection the testimony of Mr. Van Etten should be kept in mind.

> " Q. So in your report filed here you did not include earnings from the tugs, operating between New York Harbor and points outside the State?
>
> " A. No,—*business which was enroute* from one state to another has been deducted and called interstate business." (P. 11, of record.)

From this testimony it is apparent that business en route was excluded by the relator itself in making up its gross earnings report. This would seem unwarranted inasmuch as the towing service, even of business en route, was not service or business of interstate character. In other words, the relator would seem to have fared very well in the assessment of the tax for the years in question.

IV.

EVEN IF THE GROSS EARNINGS WERE DERIVED FROM BUSINESS OF AN INTERSTATE CHARACTER, YET THE STATE COULD CONSTITUTIONALLY AND LEGALLY MEASURE ITS TAX ON THE EXERCISE OF THE FRANCHISES OF ITS DOMESTIC CORPORATIONS BY SUCH GROSS EARNINGS.

That any State can measure a corporate franchise tax by gross earnings derived from interstate commerce is no longer susceptible of even doubt. Well established authorities in this court establish that proposition conclusively.

Home Insurance Co. v. *N. Y. State*, 134 U. S. 594 (1889).

This case came by writ of error from the Supreme Court of the State of New York and involved the constitutionality of chapter 540 of the Laws of 1880 as amended May 26, 1881, by chapter 361 of the Laws of that year. In other words it concerned the source of the present sections we are considering, sections 182 and 184 of the Tax Law. By reference to chapter 542 of the Laws of 1880, it will be observed that sections 3 and 6 of that statute are the prototypes respectively of sections 182 and 184 of the present law. In the *Home Insurance* case the tax payable by the company was estimated according to its dividend and aggregated $7,500. The company resisted payment, insisting that the tax was in fact levied upon the capital stock of the company and contending that there should be deducted from it

a sum varying the reduction thereto with the amount invested in bonds of the United States in capital stock and that a law requiring a tax without such reduction was unconstitutional and void. This court held that the tax was constitutional and affirmed the judgment of the Supreme Court of the State of New York.

The court said furthermore, through Justice Field, at pages 597 and 598:

> "The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded there would be no question as to the invalidity of the tax. That the bonds or obligations of the United States for the payment of money cannot be subject to taxation by a State is familiar law settled by numerous adjudications of this court. It is a tax upon the exercise of the power of Congress to borrow money: a tax which, if permitted, could be limited in amount only by the discretion of the State, and might therefore be carried to an extent impairing, if not destructive of, the efficiency of the power, to the serious detriment of the general government. * * *.
>
> "Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation, provided the same result is effected — that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly."

The court said at page 599:

> "Looking now at the tax in this case upon the plaintiff in error, we are unable to per-

ceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year."

It continues:

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. * * *."

"It is true, as said by this court in *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the Legislature of the State; it cannot be furnished by the Federal tribunals (pp. 600, 601)."

Further, on page 601:

> "The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other."

On page 602 the court said:

> "This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in Society for Savings v. Coite, 6 Wall. 594, and Provident Institution v. Massachusetts, 6 Wall. 611, which were before this court at December term, 1867."

On page 606 the court said:

> "In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States."

In the case of *Flint* v. *Stone-Tracy Co., supra,* decided by this court in 1900, the same principles are asserted, as may well be seen from the excerpt quoted above from that case in this brief.

Further, the case of *Ewing* v. *Levingworth*, 226 U. S. 464, 469, decided by this court in its October term, 1912, is of interest. The plaintiff in error was an agent of the United States Express Company at Leavenworth, Kansas. He was convicted of violating an ordinance of the city by imposing a tax. The ordinance imposed a tax of $50 per year upon the business of the Express Company, etc. It appeared that the United States Express Company received express packages at Leavenworth and forwarded them by railroad to other cities and towns, some without the State and some within the State, and also delivered packages which would have been forwarded to Leavenworth from like cities and towns. All such express packages are required to be brought into or sent out of Leavenworth, which lies west of the Missouri river in Kansas, over the Rock Island railroad, which runs along the Missouri side of the Missouri river, with a branch across the river to Leavenworth. The Express Company has no other means of transportation of packages in or out of Leavenworth. It therefore follows that every package handled by the Express Company at Leavenworth is brought from or carried into the State of Missouri over this branch of the Rock Island railroad. The actual carriage in the State of Kansas over such branch is about one mile. The record shows that about 10 per cent. of the business done at Leavenworth by the Express Company is between Leavenworth and other points in Kansas, but all such business is required to be transported in part at least within the State of Missouri.

The judgment of conviction in the said court was brought by a writ of error to this court on

the contention made that the tax thus imposed was in violation of the Federal Constitution. This court affirmed the judgment of conviction. The court said at page 467:

> "We are of opinion that this case is controlled by Lehigh Valley Railroad v. Pennsylvania, 145 U. S. 192, in which it was held that a State might tax the receipts of a railroad corporation for the portion of the transportation which was within the State, although the transportation then in question while between points within the State, passed over the railroad which traversed for a part of the way territory of an adjoining State. It was held that a tax upon such receipts did not tax interstate commerce, and this court said (p. 202): etc."

At page 468 the court said:

> "The Lehigh Valley Case was cited with approval in U. S. Express Co. v. Minnesota, 223 U. S. 335, 342, as determinative of the proposition that the State of Minnesota might tax the receipts of an express company from the transportation of packages from points within the State to other points therein although the transportation was in part outside the State."

The court further said at page 469:

> "Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. Maine v. Grand Trunk Railway Co. 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

On page 469, after discussing the case of *Hanley* v. *Kansas City Southern Railway Co.*, 187 U. S. 617, the court said:

> "The distinction is applicable here. There is no attempt to fix a rate by the authority of the State, which, while single and complete in itself, covers for a considerable part interstate transportation. The privilege tax levied in this case expressly excludes commerce of an interstate character or business done for the government, and is levied solely on the business done in the City of Leavenworth in receiving packages from points within the State and in transporting packages to like points. Applying the principles of the Lehigh Valley Case to such a situation we are of opinion that, for the purpose of a privilege tax for business thus done, the municipality, acting under authority of the State, did not exceed its just power."

So in the case at bar, section 184 expressly excludes commerce of an interstate character and is levied solely on gross earnings from the transportation or transmission business of the corporation "originating and terminating within the State of New York."

In the case of *United States Express Company* v. *Minnesota*, 223 U. S. 335, decided by this court in October term, 1911, this court said:

> "The right of the State to tax property, although it is used in interstate commerce, is thoroughly well settled. Postal Telegraph Co. v. Adams, 155 U. S. 688; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Ficklen v. Shelby County, 145 U. S. 1, 22. The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in Galveston, Harrisburg & San Antonio Ry. Co. v. Texas,

210 U. S. *supra,* wherein the possible differences between the decisions in Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. *supra,* and Maine v. Grand Trunk Ry. Co., 142 U. S. *supra,* were commented upon and explained."

The court further said at page 346:

"Appreciating the difficulty emphasized in the Galveston Case of drawing the line between taxes that burden interstate commerce and those whereby the Legislature is simply undertaking to impose a property tax within its legitimate power, measured in part by the income from interstate commerce transactions, how does the present case stand? The Supreme Court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the State, which, under their construction of the tax, included the earnings here in question. That court held that the statute was part of a system long in force in Minnesota, passed under the authority of the State Constitution, and was intended to afford a means of valuing the property of express companies within the State. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law."

The court further said on page 347:

"The tax in the present case is not like those held invalid in the Galveston Case and the Oklahoma Case, being in addition to other State taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation, seeking to reach the value of the

> property of such companies in the State, measured by the receipts from business done within the State. The statute was not aimed exclusively at the avails of interstate commerce (Philadelphia Steamship Co. v. Pennsylvania, *supra*), but, as in the Maine Case, was an attempt to measure the amount of tax within the admitted power of the State by income derived, in part, from the conduct of interstate commerce. The property of express companies, being much of it of an intangible character, is difficult to reach and properly assess for taxation."

The court said further at page 348:

> "Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the State."

And lastly and not least we cite the case of *Maine* v. *Grand Trunk Railway*, 142 U. S. *supra*,

which is conclusive upon the precise proposition contended for here. In that case the gross earnings included earnings derived from *interstate commerce*. As we have observed, it was a tax for the privilege of exercising the corporate franchises of a Canadian foreign corporation in the State of Maine and was measured by the gross earnings of the corporation, whether State or interstate. This court, as we have pointed out, sustained that tax and ever since has upheld it as a well adjudicated and well established authority.

Also see the following New York cases:

In *People ex rel. P. R. R. Co.* v. *Wemple*, 138 N. Y. 1, at p. 6, the court said:

> "There would seem to be no question that domestic corporations, engaged in both State and interstate commerce, may lawfully be subjected by the State to a franchise tax, measured by its whole capital or business, or in any other way in the discretion of the Legislature, *without taking notice of the part of its business arising from interstate commerce*, provided no hostile discrimination is made against such part. Nor would there seem to be any valid reason why a foreign corporation, engaged both in the business of State and interstate transportation in this State, should not be subject to taxation in common with domestic corporations." (Italics ours.)

In the case of *People ex rel. Penn. R. R. Co.* v. *Knight*, 171 N. Y. 354, Judge Cullen considering section 184 said at p. 355:

> "For, though it may be that the State of New York could levy a franchise tax on the gross earnings of a foreign corporation for the privilege given it of running a cab line within this State, even for the purposes of interstate commerce (see Maine v. Grand Trunk Ry. Co., 142 U. S. 217; cited with approval, 174 U. S. 70), section 184 of our Tax Law excludes earnings derived from business of an interstate character from liability of the tax."

In the case of *People ex rel. C. T. R. R. Co.* v. *Miller*, 178 N. Y. 194, it is said at p. 202:

> "Why, therefore, may not be taken into consideration, in measuring the amount of the excise tax assessed as an authority for a cor-

> poration to do business in the State, the volume of interstate commerce business done by it?"

We have a case precisely in point in *People ex rel. International Elevating Company* v. *Roberts*, 116 App. Div. 30 (New York Third Department, 1906). The tax involved was a tax upon corporate franchises under section 182 of the Tax Law. The relator was a New Jersey corporation operating thirteen floating elevators upon the waters of New York bay for the purpose of elevating grain from canal boats or trains into ocean-going steamers for shipment abroad. It also owned two barges in said waters, which were used by it for hire to such persons as might desire to use them and for such purposes as they were required in *either* State. The relator contended that the company was not taxable because it was engaged in the business of foreign and interstate commerce and that any such taxation under the State law was an attempt to regulate foreign or interstate commerce. The court, upholding the tax, said:

> "A franchise tax imposed under section 182 of the Tax Laws (Laws 1896, chap. 908), is not a tax upon the earnings or property of a corporation, but in the case of either a foreign or domestic corporation is upon the 'mere tangible right to exercise a franchise.'"

And after discussing the case, *People ex rel. U. S. A. P. P. Co.* v. *Knight*, *supra*, and *People ex rel. Penn. R. R.* v. *Knight*, *supra*, and *People ex rel. Hatch* v. *Reardon*, 184 N. Y. 431, Judge Kellogg said:

> "Therefore even if the business of the relator was interstate or foreign commerce, that furnishes no valid objection to this tax."

This would seem to be controlling authority upon the objection considered under this point.

See also:

> *People ex rel. American Soda Fountain Co.* v. *Roberts*, 158 N. Y. 168, at p. 174.

V.

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK BROUGHT UP BY THE WRIT OF ERROR HEREIN SHOULD BE AFFIRMED WITH COSTS AND DISBURSEMENTS TO THE DEFENDANT IN ERROR HEREIN.

Dated, Albany, N. Y., October 7, 1914.

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